2007

Superior Recovery Service, Inc. v. James E. Pett : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SUPERIOR RECOVERY SERVICE, INC., Plaintiff, vs. JAMES E. PETT, Defendant.	Court of Appeals Case No. 20070095-CA District Court Case No. 060100241 DC

OPENING BRIEF OF APPELLANT JAMES E. PETT

This is an appeal from a grant of summary judgment entered in the first district court of cache county, by judge lowe, in favor of the Superior recovery service, inc., and against James E. Pett.

Priority of Argument 15

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The Utah Court of Appeals has jurisdiction pursuant to the provisions of UCA §78-2a-3(2)(j).

IV
ISSUES FOR REVIEW

1. Did the trial court err as a matter of law in granting Superior's motion for summary judgment. (Record at 36-55).

Standard of Review: In considering an appeal of the grant or denial of a summary judgment, appellate courts review the facts and all reasonable inferences from them in a light most favorable to the losing party. The legal conclusions reached by the trial court in granting summary judgment are accorded no deference but, instead, are reviewed for

correctness. *Holt v. Katsanevas*, 854 p.2d 575 (Ut. App. 1993), citing *Larson v. Overland Thrift & Loan*, 818 P.2d 1316, 1319 (Utah App.1991), cert. denied, 832 P.2d 476 (Utah 1992) and *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991).

2. Did the trial court err as a matter of law in weighing the evidence in this case? (Record at 97-101).

Standard of Review: In considering an appeal of the grant or denial of a summary judgment, appellate courts review the facts and all reasonable inferences from them in a light most favorable to the losing party. The legal conclusions reached by the trial court in granting summary judgment are accorded no deference but, instead, are reviewed for correctness. *Holt v. Katsanevas*, 854 p.2d 575 (Ut. App. 1993), citing *Larson v. Overland Thrift & Loan*, 818 P.2d 1316, 1319 (Utah App.1991), cert. denied, 832 P.2d 476 (Utah 1992) and *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991).

3. Did the trial court err as a matter of law in viewing the evidence in this case in a light most favorable to Superior? (Record at 97-101).

Standard of Review: In considering an appeal of the grant or denial of a summary judgment, appellate courts review the facts and all reasonable inferences from them in a light most favorable to the losing party. The legal conclusions reached by the trial court in granting summary judgment are accorded no deference but, instead, are reviewed for correctness. *Holt v. Katsanevas*, 854 p.2d 575 (Ut. App. 1993), citing *Larson v. Overland Thrift & Loan*, 818 P.2d 1316, 1319 (Utah App.1991), cert. denied, 832 P.2d

476 (Utah 1992) and *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991).

4. Did the trial court err as a matter of law in denying Mr. Pett's Motion to Strike the affidavit of Wendy Gittins? (Record at 75-83).

Standard of Review: In reviewing a motion to strike an affidavit, appellate courts apply a correction-of-error standard. *Bonneville Billing v. Whatley*, 949 P.2d 768 (Ut. App. 1997), citing *State Dep't of Soc. Servs. v. Vigil*, 784 P.2d 1130, 1132 (Utah 1989) and *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 754 n. 11 (Ut. App.1990)

5. Did the trial court err in awarding Superior attorney's fees and interest at the rate of 18% on the amount in claimed Mr. Pett owned in its complaint? (Record at 97-101).

Standard of Review: In considering an appeal of the grant or denial of a summary judgment, appellate courts review the facts and all reasonable inferences from them in a light most favorable to the losing party. The legal conclusions reached by the trial court in granting summary judgment are accorded no deference but, instead, are reviewed for correctness. *Holt v. Katsanevas*, 854 p.2d 575 (Ut. App. 1993), citing *Larson v. Overland Thrift & Loan*, 818 P.2d 1316, 1319 (Utah App.1991), cert. denied, 832 P.2d 476 (Utah 1992) and *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991).

V
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

RULES:

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and

supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

VI
STATEMENT OF THE CASE

A
NATURE OF THE CASE

This is an appeal of the trial court's December 20, 2006 "Findings, Order, and Judgment" granting Superior's motion for summary judgment, as modified by the trial court's memorandum decision dated December 28, 2006, and the trial court's denial of Mr. Pett's Motion to Strike the Affidavit of Wendy Gittins also dated December 28, 2006.

B
COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

Superior filed a complaint against Mr. Pett on February 1, 2006, claiming that he owed a sum of money to it for services allegedly provided to Mr. Pett or on behalf of Mr. Pett's family.

Mr. Pett answered the complaint on February 17, 2006, denying Superior's allegations contained in its complaint and asserted various affirmative defenses.

The trial court sent a notice of intent to dismiss for failure to prosecute on July 21, 2006.

On July 31, 2006, Superior filed a motion for judgment on the pleadings or in the alternative for summary judgment(hereinafter, "Superior's motion"). In conjunction with its motion, Superior filed a memorandum and an affidavit from Wendy Gittins.

Mr. Pett filed a memorandum in opposition to Superior's motion on August 18, 2006, and supported the memorandum with his own Affidavit.

Superior filed a reply memorandum on August 28, 2006.

Mr. Pett filed a Motion to Strike the Affidavit of Gittins (hereinafter, "Mr. Pett's Motion") on September 5, 2006, and supported it with a memorandum.

Superior filed a memorandum in opposition to Mr. Pett's Motion on September 13, 2006.

On December 1, 2006, the trial court entered a memorandum decision granting Superior's motion.

On or about September 5, 2006, Mr. Pett's counsel received the trial courts memorandum decision granting Superior's motion for summary judgment. Therefore, Mr. Pett's counsel did not file Mr. Pett's reply memorandum in support his Motion or submit the motion for decision.

On December 20, 2006, Pett filed an objection to Superior's proposed order on its motion.

On December 20, 2006, the trial court entered a document entitled Findings, Order And Judgment, in which it stated: *"The Court finds that the defenses raised in the Defendant's Memorandum in Opposition appear to be disingenuous."*

On December 28, 2006, the trial court entered a second memorandum decision on Mr. Pett's Objection to Superior's proposed order and judgment in its motion for summary judgment and denying Mr. Pett's Motion, where in it again launched into an examination of the facts, weighed the facts and again viewed the evidence in a light most favorable to Superior. At the end of the memorandum decision the trial court stated:

This memorandum decision will serve as notice that the Findings, Order and

Judgment submitted by the Plaintiff have been modified on the first line under findings to provide that:

"The Court finds the defenses raised in the Defendant's Memorandum in Opposition appear to be without merit." (Record at 101-104).

On December 29, the trial court entered an order denying Mr. Pett's Motion.

On January 29, 2007, Mr. Pett filed his Notice of Appeal.

C
STATEMENT OF FACTS

1. The plaintiff filed its complaint on February 1, 2006 asserting that it was the assignee of Interwest Anesthesia and that Mr. Pett owed a sum of money to Interwest. (Record at 3-6).

2. Mr. Pett filed an answer disputing the plaintiff's assertion that he owed Interwest Anesthesia or the plaintiff any amount of money. (Record at 10-17).

3. On or about July 31, 2006, the plaintiff filed a "motion for judgment on the pleadings or in the alternative, for summary judgment." (Record at 21-22).

4. On August 17, 2006, Mr. Pett filed a Memorandum in Opposition to the plaintiff's "motion for judgment on the pleadings or in the alternative, for summary judgment," accompanied by an affidavit disputing the assertions contained in plaintiff's "motion for judgment on the pleadings or in the alternative, for summary judgment." (Record at 36-51).

5. The plaintiff filed a reply memorandum in support of its "motion for judgment on the pleadings or in the alternative, for summary judgment." on August 28, 2006. (Record at 57-66).

6. The plaintiff filed a notice to submit on August 30, 2006. (Record at 70-72).

7. The trial court entered its memorandum decision granting the plaintiff's "motion for judgment on the pleadings or in the alternative, for summary judgment" on December 1, 2006, stating *"The Court finds that the defenses raised in the Defendant's Memorandum in Opposition appear to be disingenuous."* (Record at 77-83).

8. The plaintiff prepared "findings, order and judgment" and served a copy of the "findings, and Judgment" on Mr. Pett's counsel on or about December 12, 2006. (Record at 97-100).

9. Mr. Pett filed an objection to plaintiff's "findings, order and judgment" on December 20, 2006. (Record at 101-107).

10. Even though Mr. Pett filed an objection to plaintiff's "findings, order and judgment" within the time specified in Rule 7(e) and 7(f)(2) URCP, the trial court nonetheless signed plaintiff's "findings, order and judgment" on December 20, 2006 without considering or addressing Mr. Pett's Objection to plaintiff's "findings, order and judgment." (Record at 94-95).

11. Mr. Pett filed a Motion to Strike the Affidavit of Wendy Gittins on September 5, 2006. However, because he received the court's memorandum decision granting plaintiff's "motion for judgment on the pleadings or in the alternative, for summary judgment." the same day he mailed his Motion to Strike the Affidavit of Wendy Gittins, he never bothered to submit the Motion for decision. (Record at 75-83).

12. On December 28, 2006, the trial court issued a memorandum decision denying Mr. Pett's Motion to Strike the Affidavit of Wendy Gittins. The trial court also stated

that Mr. Pett was correct in its assertion that it was improper for the court to make findings. Then, the trial court launched into a gratuitous examination and weighing of the disputed facts of that case and proceeded to examine the disputed facts, make factual findings concerning the disputed facts and viewing the disputed facts in a light most favorable to the plaintiff. After making its gratuitous examination and weighing of the disputed facts, viewing the disputed facts in a light most favorable to the plaintiff, and making factual findings concerning the disputed facts the trial court made the following nonsensical statement:

> *This memorandum decision will serve as notice that the Findings, Order and Judgment submitted by the Plaintiff have been modified on the first line under findings to provide that:*
>
> *"The Court finds the defenses raised in the Defendant's Memorandum in Opposition appear to be without merit."* (Record at 101-106).

13. Mr. Pett filed his Notice of Appeal on January 29, 2007. (Record at 113).

VII
SUMMARY OF ARGUMENT

The trial court committed reversible and prejudicial error with it granted Superior's motion for summary judgment. The trial court committed reversible and prejudicial error when it weighed the evidence on Superior's motion for summary judgment. The trial court also committed reversible and prejudicial error when it viewed the disputed facts in a light most favorable to Superior on Superior's motion for summary judgment. The trial court further erred and committed reversible and prejudicial error when it denied Mr. Pett's Motion to Strike the affidavit of Wendy Gittins. The trial court

also erred and committed reversible and prejudicial error when it awarded Superior attorney's fees and interest at 18% on its motion for summary judgment.

VIII
ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT GRANTED SUPERIOR'S MOTION FOR SUMMARY JUDGMENT.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT GRANTED SUPERIOR'S MOTION FOR SUMMARY JUDGMENT.

A. SUMMARY JUDGMENT MAY ONLY BE ENTERED WHEN THERE ARE NO GENUINE ISSUES OF MATERIAL FACT PRESENT IN THE CASE:

In pertinent part, Rule 56(c) URCP provides:

> *The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.* (Emphasis added).

Additionally, Utah appellate courts have long and consistently held that summary judgment can only be granted if there are no genuine issues of material fact and if the moving party is entitled to summary judgment as a matter of law.

> *"Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." Jones v. ERA Brokers Consol., 2000 UT 61, ¶ 8, 6 P.3d 1129; see also Utah R. Civ. P. 56(c).*

Collard v. Nagle Construction, Inc., 57 P.3d 603 (Ut. App. 2002).

> *A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists, Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995). Tretheway v. Miracle Mortgage, Inc., 2000 UT 12, ¶2 995 P.2d 599.*

Pigs Gun Club, Inc. v. Sanpete City., 42 P.3d 379 (Utah 2001).

In *Hebertson v. Bank One*, 342 P.2. 383 (Utah 1999), the Utah Supreme Court, quoting *Parker v. Dodgion*, 971 P.2d 496 (Utah 1998), declared that: *"Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law."* See also, *Certified Sur. Group, Ltd. v. UT Inc.*, supra, citing *Taylor v. Ogden Sch. Dist.*, supra. *"In ruling on a motion for summary judgment, the court may consider only facts that are not in dispute."* *Sorensen v. Beers*, 585 P.2d 458 (Utah 1978).

> *By definition, summary judgment cannot be granted where there are disputed facts. Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994) ("Summary judgment is proper only when no genuine issues of material fact remain....").*

Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941 (Utah 1996).

In *Christensen ex rel. Christensen v. Financial Serv. Co.*, 14 Utah 2d 101, 377 P.2d 110, (1963), the Utah Supreme Court held that summary judgment cannot properly be granted if the allegations in the plaintiff's complaint stand in opposition to the averments of the affidavits so that there are controverted issues of fact, the determination of which is necessary to settle the rights of the parties. In *Holbrook Co. V. Adams*, 542 P.2d 191 (Utah 1975), the Utah Supreme Court stated that *"It takes only one sworn statement to dispute the averments on the other side of controversy and create an issue of fact, precluding summary judgment."*

In *Sanberg v. Klein*, 576 P.2d 1291 (Utah 1978), the Utah Supreme Court stated:

> *Where the parties were not in complete conflict as to certain facts, but the understanding, intention, and consequences of those facts were vigorously*

disputed, the matter was not proper for summary judgment and could only be resolved by a trial.

Because the trial court improperly made improper and unlawful factual findings and ignored the standard for summary judgment when it granted Superior's motion for summary judgment, this Court must reverse the trial court's grant of summary judgment in favor of Superior, as a matter of law.

B. THERE ARE GENUINE ISSUES OF MATERIAL FACT PRESENT IN THIS CASE WHICH PRECLUDED THE TRIAL COURT FROM ENTERING SUMMARY JUDGMENT IN FAVOR OF SUPERIOR.

Because there are genuine issues of material fact present in this case, the trial court erred as a matter of law, and committed reversible and prejudicial error, when it granted Superior's motion for summary judgment.

1. Superior's Own Documents Establish That There Is A Genuine Issue Of Fact As To How Much, If Any, Mr. Pett Allegedly Owes Interwest.

In its complaint, Superior claims that Mr. Pett owes it $1,299.05, with $627.04 allegedly representing the *"Unpaid Principal."* (Record at 6). In her affidavit, Gittens claims that the principal amount owed to Interwest is $572.00. (Record at 30). However, in Exhibit A, attached to the affidavit of Gittins, that Superior filed in support of its motion for summary judgment, Interwest claims that only $317.57 was allegedly transferred to Superior for collection. (Record at 34). Therefore, there is a genuine issue of material fact in Superior's own documents as to how much, if any, Mr. Pett allegedly owes to Interwest.

Because there is a genuine issue of material fact as to how much, if any, Mr. Pett

allegedly owes to Interwest, the trial court could not grant Superior's motion for summary judgment. Because the trial court granted Superior's motion for summary judgment when there is a genuine issue of material fact as to how much, if any, Mr. Pett allegedly owes to Interwest, the trial court erred, as a matter of law, and committed prejudicial and reversible error, when it granted Superior's motion for summary judgment. Therefore, this Court must reverse the trial court's grant of summary judgment in favor of Superior.

2. Mr. Pett's Affidavit Creates Genuine Issues Of Material Fact That Precluded The Trial Court From Granting Superior's Motion For Summary Judgment.

In its memorandum in support of its motion for summary judgment Superior states:

On or about July 12, 2004 the Defendant's insurance company, Altius, sent a payment, in the amount of $334.62 to Interwest Anesthesia. (Record at 24, ¶ 9).

However, Altius retracted that payment on July 31, 2005, because on or about February 25, 2006, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004. (Emphasis added). (Record at 24, ¶ 10).

In his Affidavit, filed in support of his Memorandum in Opposition to Superior's Motion for Summary Judgment, Mr. Pett states:

Gittins' claim, as set forth in paragraph 13 of her affidavit, that on February 25, 2005, Altius paid me $514.80, is not true. I have never received any payment from Altius in the fifteen years I have been covered by their insurance. (Record at 54, ¶ 9).

I have no way of knowing if Altius paid Interwest $334.62 on July 12, 2004, as Gittins claims in paragraph 12 of her affidavit, however, I never received $514.80 from Altius on February 25, 2005. I would remember if, out of the blue, anyone sent me a check for $514.80, and if Interwest claims it did, where is the check with my signature on it? (Record at 54, ¶ 13).

Because Superior bases its claim that Altius retracted its payment of $334.62 to

Interwest, on behalf of Mr. Pett, "*because on or about February 25, 2006, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004,* Mr. Pett's sworn statement, in his affidavit, stating that he did not receive any payments from Altius in the entire fifteen years he has been insured by Altius, creates a genuine issue of material fact as to whether or not the payment of $334.62 to Interwest, on behalf of Mr. Pett, was ever *"retracted."* If, as Superior claims, the payment of $334.62 to Interwest, on behalf of Mr. Pett, was only *"retracted"* because Mr. Pett allegedly received a payment of $514.80 on February 25, 2005, and Mr. Pett swears, under oath, that he never received any payment from Altius in the amount of $514.80 on February 25, 2005, or any other amount at any other time, there is a genuine issue of material fact as to whether or not Altius ever *"retracted"* any payment from Interwest, and thus there is a genuine issue of material fact as to what amount, if any, Mr. Pett allegedly owes Interwest.[1]

Because the trial court granted Superior's motion for summary judgment when there is a genuine issue of material fact as to how much, if any, Mr. Pett allegedly owes to Interwest, the trial court erred, as a matter of law, and committed prejudicial and reversible error when it granted Superior's motion for summary judgment. Therefore, this Court must reverse the trial court's grant of summary judgment in favor of Superior.

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1. *"It takes only one sworn statement to dispute the averments on the other side of controversy and create an issue of fact, precluding summary judgment." Holbrook Co. V. Adams*, supra.

3. Superior's Assertion That Altius "*Retracted*" A Payment It Made To Interwest, On Mr. Pett's Behalf, Some Three Hundred Eighty-Four Days After Altius Made That Payment To Interwest, Is So Ludicrous That It Alone Creates A Genuine Issue Of Material Fact As To Whether Or Not Altius In Fact "*Retracted*" Any Payment It Made To Interwest, On Mr. Pett's Behalf And A Genuine Issue Of Material Fact As To How Much, If Any, Mr. Pett Owes To Interwest.

On page 2, ¶ 9, of Superior's statement of facts, set forth in its memorandum of points and authorities in support of its motion, (hereinafter, "Superior's memorandum"), Superior claims that it was paid the sum of $334.62 by Altius on July 12, 2004. (Record at 24). Then on page 2, ¶ 10, of Superior's statement of facts, set forth in its memorandum Superior claims that Mr. Pett's insurance carrier, Altius, *"retracted that payment on July 31, 2005...."* (Record at 24). However, Superior failed to provide any evidence whatsoever indicating that Altius ever retracted any payment it made to Interwest on behalf of Mr. Pett at any time, and it is completely absurd to assume that Altius could retract a payment it made to Interwest three hundred eighty-four days earlier.

Superior offers no explanation as to how Altius was able to retract a payment it made more than a year earlier. Superior does not claim that Altius has access to its bank accounts and/or the authority or ability to simply retract payments from Interwest's bank accounts on its own, without any authority from Interwest.[2] Therefore there is a genuine

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2. In response to Mr. Pett's assertion that Altius did not, and could not, take money from Interwest's bank accounts, Superior makes the absurd assertion that Altius offset the money it paid Interwest, on Mr. Pett's behalf, from payments it owed Interwest for treatment of others covered by Altius. In its reply memorandum in support of its motion for summary judgment, Superior makes the following ludicrous statement: *"Is it that unusual of a concept that if Interwest did not send a refund check to Altius that Altius would of-set the amount against another account."* (Record at 62).

question of fact if and how Altius could have *"retracted that payment on July 31, 2005...,"* as Superior claims.

There is simply no evidence that Altius ever *"retracted"* the payment to Interwest, that Superior admits Altius made to Interwest. Gittins' self-serving allegations, set forth in her affidavit, do not establish that Altius ever *"retracted"* any payment to Interwest, and, likewise, the alleged *"Patient Ledger Analysis"* does not establish as a matter of fact that Altius ever *"retracted"* any payment to Interwest. If Superior is going to claim that Altius *"retracted"* any payment to Interwest, it must provide proof in the form of bank statements showing that the payment, that it admits Interwest received from Altius, was in fact ever *"retracted,"* as Superior claims.[3]

Is it that unusual of a concept that if Justice Orme's check is returned by his bank for non sufficient funds that Smiths would collect the amount of Justice Orme's check against Justice Billings' account because Justice Orme and Justice Billings have accounts at the same bank? Such an assertions is simply inane!

If Superior has any evidence that Altius ever *"retracted"* any payment to Interwest, then Superior was required to provide that evidence to the trial court and Mr. Pett. It did not do so, because it has no such evidence, and, therefore, it cannot do so, because Altius did not and could not *"retract"* any payment it made to Interwest 384 days after making the payment.

3. Exhibit A to Gittins' affidavit, termed a *"Patient Ledger Analysis,"* appears to be a document created expressly for purposes of this litigation, rather than a document that is prepared and kept in the ordinary course of business; therefore, the validity and accuracy of it are suspect at best. This is especially true because the entries in Exhibit A are not in chronological order. The last four entries on page two of the *"Patient Ledger Analysis,"* are dated 6/10/2004, 7/12/2004, 9/1/2004, and 10/1/2005. Those entries follow twelve entries in 2005 on page one of the *"Patient Ledger Analysis,"* ending with the last entry on 9/1/2005. If the *"Patient Ledger Analysis"* was a real business record prepared by Interwest at the time the entries allegedly made and kept in the ordinary course of business, the *"Patient Ledger Analysis"* would be in chronological order. The fact that they are not clearly establishes that the *"Patient Ledger Analysis"* is a document created expressly for purposes of litigation, rather than a document that is prepared and kept in

Because there is a genuine issue of material fact as to whether or not the money Altius paid to Interwest was in fact *"retracted,"* there is a genuine issue of fact as to how much, if any, Mr. Pett owes to Interwest. Therefore as a matter of law, the trial court erred, and committed prejudicial and reversible error, when it granted Superior's motion for summary judgment, and, as a matter of law, this Court must reverse the trial court's grant of summary judgment in favor of Superior.

C: BECAUSE SUPERIOR WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT GRANTED SUPERIOR'S MOTION FOR SUMMARY JUDGMENT.

A party is only entitled to summary judgment if, in addition to there being no genuine issues of material fact in a case, the party moving for summary is entitled to summary judgment as a matter of law. Rule 56(c) URCP: *"The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.* (Emphasis added). See, *Collard v. Nagle Construction, Inc.*, *Hebertson v. Bank One*, *Parker v. Dodgion*, *Certified Sur. Group, Ltd. v. UT Inc.*, and *Taylor v. Ogden Sch. Dist.*, supra.

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the ordinary course of business. Therefore, anything contained in it, and any reference to it, should have been ignored when the trial court ruled on Superior's motion for summary judgment, because Gittins did not provide a foundation establishing the *"Patient Ledger Analysis"* to be a business record, and could not provide a foundation establishing the *"Patient Ledger Analysis"* to be a business record, because the *"Patient Ledger Analysis"* is a document created expressly for purposes of this litigation, rather than a document that is prepared and kept in the ordinary course of business.

In the instant matter, Superior was not entitled to summary judgment as a matter of law, because there is a genuine issue of material fact as to how much, if any, Mr. Pett owes to Interwest. Therefore, as a matter of law, the trial court was not permitted to grant Superior's motion for summary judgment, and this Court, as a matter of law, must reverse the trial court's grant of summary judgment in favor of Superior.

POINT II

THE TRIAL COURT ERRED AS A MATTER OF LAW, AND COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT WEIGHED THE FACTS ON SUPERIOR'S MOTION FOR SUMMARY JUDGMENT.

It is an undeniable fact that, under clear and controlling Utah law, a trial court cannot weigh the facts on a motion for summary judgment and/or determine what the facts of the case are.

> *A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists, Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995) ("On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist.")....*

Pigs Gun Club, Inc. v. Sanpete City., supra.

In *Hill v. Grand Central, Inc.,* supra, the Utah Supreme Court stated that a motion for summary judgment can *"never be used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute."* See also, *W,M. Barnes Co. V. Sohio Natural Resources Co.*, 627 P.2d 56 (Utah 1981) holding *"On a motion for summary judgment, it is not appropriate for a court to weigh disputed evidence concerning such factors,"* and *Spor v. Crested Butte Silver Mining, Inc.*, 740

P.2d 1304 (Utah 1987), declaring: *"the sole inquiry to be determined is whether there is a material issue of fact to be decided."*

In *Singlketib v, Alexander*, 19 Utah 2d 292, 431 P.2d 126 (1967), the Utah Supreme Court declared that a *"Court cannot consider weight of testimony or credibility of witness on motion for summary judgment; court simply determines that there is no disputed issues of material fact and that as a matter of law one party should prevail."*

> *It will be noted that a summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party also is entitled to judgment as a matter of law under those facts. The court cannot consider the weight of testimony or the credibility of witnesses in considering a motion for summary judgment. He simply determines that there is no disputed issue of material fact and that as a matter of law a party should prevail.*

Id..

> *However, inasmuch as the party moved against is being defeated without the privilege of a trial, the court should carefully scrutinize the "submissions" and contentions he makes thereon to see if his contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail; and if it so appears, the motion for summary judgment should be denied and a trial should be had for the purpose of resolving the disputed issues of fact and determining the rights of the parties.*

Rich v. McGovern, 551 P.2d 1266 (Utah 1976), citing *Transamerica Title Ins. Co. v. United Resources Inc.*, 24 Utah 2d 346, 471 P.2d 165 (Utah 1970).

In the instant matter, the trial court improperly and unlawfully weighed the alleged evidence and made improper and unlawful factual determinations concerning the alleged evidence in the case. In its memorandum decision dated December 28, 2006, the trial court made the following statements in a pathetic attempt to justify its memorandum decision dated December 1, 2006, wherein it stated that Superior's motion for summary

judgment was granted *"for the reasons set forth in the Plaintiff's Memorandum of Points and Authorities and in its Reply Memorandum, the motion is granted:"*

In its memorandum decision of December 28, 2006 the trial court stated:

> *A statement of facts must be supported by an affidavit, and moreover, must be material or facts pertinent to the issue at hand to preclude summary judgment Though most of the facts contested in Defendant's statement go to some of the underlying issues, none of them go to the heart of the issue, whether Defendant is indebted for services received.* (Emphasis added), (Record at 102).
>
> *Specifically, Defendant first asserts Plaintiff was paid for the medical services provided to Mr. Pett's daughter and therefore, the Plaintiff is not entitled to summary judgment. Yet, there is no issue of fact with respect to that. The fact Defendant's daughter received services is undisputed and to suggest that "it is not reasonable or logical to assume that Mr. Pett's insurance carrier could or would retract a payment it made to Interwest 384 days earlier, and that Plaintiff offers no explanation as to how Mr. Pett's insurance carrier was able to retract a payment it made more than a year earlier," does not necessarily raise an issue of fact. Simply making a blanket assertion that an insurance carrier retracted a payment does not raise a material issue of fact that Defendant is not obligated for the alleged debt.* (Emphasis added), (Record at 103).
>
> *To suggest that he had no knowledge of the debt, or that it may have been paid by his insurance carrier does not negate the claim by the Plaintiff that the Defendant is indebted and owes for the services provided.* (Emphasis added), (Record at 103).
>
> *The allegation that he was never informed of the obligation and the question as to whether Interwest was in fact paid does not an issue of fact create to dispute his underlying obligation.* (Emphasis added), (Record at 103).

By stating:

> *Though most of the facts contested in Defendant's statement go to some of the underlying issues, none of them go to the heart of the issue, whether Defendant is indebted for services received,*

the trial court admits that Mr. Pett's affidavit disputes the factual allegations contained in Superior's memorandum. However, the trial court then weighs the statements contained in Mr. Pett's affidavit and the statements in Superior's memorandum and improperly

ews the disputed facts in the light most favorable to Superior, while completely ignoring facts Mr. Pett's affidavit establishes that there is a genuine dispute to that amount, if any, Mr. Pett owes Interwest.

By stating:

> *Specifically, Defendant first asserts Plaintiff was paid for the medical services provided to Mr. Pett's daughter and therefore, the Plaintiff is not entitled to summary judgment. Yet, there is no issue of fact with respect to that. The fact Defendant's daughter received services is undisputed and to suggest that "it is not reasonable or logical to assume that Mr. Pett's insurance carrier could or would retract a payment it made to Interwest 384 days earlier, and that Plaintiff offers no explanation as to how Mr. Pett's insurance carrier was able to retract a payment it made more than a year earlier," does not necessarily raise an issue of fact. Simply making a blanket assertion that an insurance carrier*, (Emphasis added)

the trial court admits that there is a genuine issue of fact as to how much, if any, Mr. Pett owes Interwest.

The trial court stated:

> *Defendant first asserts Plaintiff was paid for the medical services provided to Mr. Pett's daughter and therefore, the Plaintiff is not entitled to summary judgment. Yet, there is no issue of fact with respect to that.*

Then in a most incredible leap of illogical, irrational, unreasonable, fallacious, and specious lack of reasoning, the trial court states the fact that Superior admits that Altius paid Interwest for the service allegedly rendered on behalf of Mr. Pett's daughter *"does not necessarily raise an issue of fact*" as to how much, if any, Mr. Pett allegedly owes Interwest. That assertion is so inane it defies description, and it is an impermissible weighing of factual disputes and viewing the disputed facts in the light most favorable to Superior.

The trial court's statement that:

> *To suggest that he had no knowledge of the debt, or that it may have been paid by his insurance carrier does not negate the claim by the Plaintiff that the Defendant is indebted and owes for the services provided,*

is another statement that is so ludicrous it defies all logic and reason. The trial court first admits that Interwest may have been paid by Altius for any services it alleged rendered on behalf of Mr. Pett and then states that the fact that Interwest may have been paid *"does not negate the claim by the Plaintiff that the Defendant is indebted and owes for the services provided."* That assertion is so inane it defies description, and it is an impermissible weighing of factual disputes and viewing the disputed facts in the light most favorable to Superior.

The trial court's assertion that:

> *The allegation that he was never informed of the obligation and the question as to whether Interwest was in fact paid does not an issue of fact create to dispute his underlying obligation,*

is also so ludicrous it defies all logic and reason. The trial court admits that there is an issue as to whether or not Interwest was paid for any services it allegedly provided on behalf of Mr. Pett, but then states that the fact that Interwest may have been paid for those services is irrelevant and does not create an issue of fact as to how much, if any, Mr. Pett may owe Interwest. That assertion is so also inane it defies description, and it is an impermissible weighing of factual disputes and viewing the disputed facts in the light most favorable to Superior.

Because the trial court improperly and unlawfully weighed the alleged evidence and made improper and unlawful factual determinations concerning the evidence in the case, the trial court erred as a matter of law and committed reversible and prejudicial

error when it granted Superior's motion for summary judgment. Therefore, as a matter of law, this Court must reverse the trial courts grant of summary judgment in favor of Superior.

POINT III

THE TRIAL COURT ERRED AS A MATTER OF LAW, AND COMMITTED REVERSIBLE AND PREJUDICIAL ERROR WHEN IT VIEWED THE ALLEGED EVIDENCE IN THIS CASE IN THE LIGHT MOST FAVORABLE TO SUPERIOR.

Utah appellate courts have also consistently and repeatedly held that, on a motion for summary judgment, a trial court is required to view all disputed factual allegations in a light most favorable to the nonmoving party. *Tretheway v. Miracle Mortgage, Inc.*, supra, the Utah Supreme Court stated:

> *"On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist."), viewing the facts and all reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party.* (Emphasis added).

In *Controlled Receivables, Inc. v. Harman*, 413 P.2d 807 (Utah, 1966), the Utah Supreme Court stated:

> *A motion for summary judgment is a harsh measure, and for such reason contentions of party opposing the motion must be considered in a light most advantageous to him and all doubts resolved in favor of permitting him to go to trial, and motion should be granted only when, viewing the matter thusly, no right to recovery could be established.* (Emphasis added).

> *Summary judgment is a drastic remedy and courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial, and therefore, summary judgment should be granted only when under the facts viewed in the light most favorable to the plaintiff he could not recover as a matter of law.* (Emphasis added).

Welchman v. Wood, 337 P.2d 410 (Utah, 1959).

In the instant matter, the trial court not only improperly and unlawfully weighed the alleged facts in this case, but it also undisputedly viewed the alleged facts in a light most favorable to Superior when it considered and ruled on Superior's motion for summary judgment. As set forth in Point II of this brief, when the trial court made the following inane conclusions, it not only improperly and unlawfully weighed the disputed facts in this case, it also viewed those disputed facts in a light most favorable to superior:

> *A statement of facts must be supported by an affidavit, and moreover, must be material or facts pertinent to the issue at hand to preclude summary judgment Though most of the facts contested in Defendant's statement go to some of the underlying issues, none of them go to the heart of the issue, whether Defendant is indebted for services received.* (Emphasis added).

> *Specifically, Defendant first asserts Plaintiff was paid for the medical services provided to Mr. Pett's daughter and therefore, the Plaintiff is not entitled to summary judgment. Yet, there is no issue of fact with respect to that. The fact Defendant's daughter received services is undisputed and to suggest that "it is not reasonable or logical to assume that Mr. Pett's insurance carrier could or would retract a payment it made to Interwest 384 days earlier, and that Plaintiff offers no explanation as to how Mr. Pett's insurance carrier was able to retract a payment it made more than a year earlier," does not necessarily raise an issue of fact. Simply making a blanket assertion that an insurance carrier retracted a payment does not raise a material issue of fact that Defendant is not obligated for the alleged debt.* (Emphasis added).

> *To suggest that he had no knowledge of the debt, or that it may have been paid by his insurance carrier does not negate the claim by the Plaintiff that the Defendant is indebted and owes for the services provided.* (Emphasis added).

> *The allegation that he was never informed of the obligation and the question as to whether Interwest was in fact paid does not an issue of fact create to dispute his underlying obligation.* (Emphasis added).

Because the trial court is prohibited by clear and controlling Utah law from weighing facts and because the trial court was required to view all disputed facts in a light most favorable to Mr. Pett, the trial court committed prejudicial and reversible error

when it granted Superior's motion for summary judgment. Therefore, as a matter of law, this Court must reverse the trial court's grant of summary judgment in favor of Superior.

POINT IV

THE TRIAL COURT ERRED AND COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT FAILED TO STRIKE THE AFFIDAVIT OF WENDY GITTINS AND THEN RELIED ON HER AFFIDAVIT IN RULING ON SUPERIOR'S MOTION FOR SUMMARY JUDGMENT.

In pertinent part, Rule 56(e) URCP, (hereinafter "Rule 56"), provides as follows:

> *(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.* (Emphasis added).

Gittins' affidavit is not based on personal knowledge, as required by Rule 56(e) URCP. Therefore, the trial court was required to strike it and not rely on it when ruling on Superior's motion for summary judgment.

In paragraph 3, page 2, of her affidavit Gittins states: *"Based upon my personal knowledge, memory, and review of the Defendant 's account in this matter, I have determined the following:"* (Record, at 30).

In paragraph 4, page 2, of her affidavit Gittins states: *"On or about May 27, 2004, Heather Pett, born September 16, 1999, the defendant's daughter, in Cache County, State of Utah obtained services and supplies from Interwest Anesthesia, and the principal charge was $572. 00."* (Record, at 30).

In paragraph *5,* page 2, of her affidavit Gittins states: *"The Defendant promised to*

pay for these services and supplies, signed a contract (the "Agreement"). (Record, at 30).

In paragraph 6, page 2, of her affidavit Gittins states: *"The Agreement provides that among other services that may be provided are anesthesia."* (Record, at 30).

In paragraph 7, page 2, of her affidavit Gittins states: *"The Agreement provides that Defendant, in addition to paying for the service and supplies, he is liable for interest at 18% per annum, court costs, the costs of collection, which includes a collection fee, and attorney 's fees incurred in the collection process."* (Record, at 30).

In paragraph 8, page 2, of her affidavit Gittins states: *"The Agreement states under paragraph 2: FINANCIAL AGREEMENT: I agree to pay for all services and supplies rendered to the patient in accordance with the rates and financial policies in effect at the time of service."* (Record, at 30).

In paragraph 9, page 2, of her affidavit Gittins states: *"Paragraph 3 states: "I understand that I am responsible for any and all charges not covered by my insurance policy(s)."* (Record, at 30).

In paragraph 10, page 2, of her affidavit Gittins states: *"Per the terms of the Agreement, and in order to make sure that Interwest Anesthesia is made whole, a collection charge was added to the account in the amount of $317.57 prior to referral to Superior."* (Record, at 30).

In paragraph 11, page 2, of her affidavit Gittins states: *"The Defendant breached the Agreement by not paying for the services and supplies."* (Record, at 31).

In paragraph 12, page 2, of her affidavit Gittins states: *"On or about July 12, 2004*

the Defendant's insurance company, Altius, sent a payment, in the amount of $334.62, to Interwest Anesthesia." (Record, at 31).

In paragraph 13, page 2, of her affidavit Gittins states: *"However, Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004."* (Record, at 31).

In paragraph 14, page 2, of her affidavit Gittins states: *"We sent statements to the Defendant on a regular basis. On the account statement, when there is a finance charge, those dates that we sent statements. Finally, on September 2005, Interwest Anesthesia sent a precollection letter to the defendant, which included a copy of the account statement to day, requesting payment."* (Record, at 31).

In paragraph 3, page 2, of her affidavit Gittins states: *"Based upon my personal knowledge, memory, and review of the Defendant's account in this matter..."* (Record, at 31). Gittins' memory and review of the Defendant's account is not personal knowledge as mandated by Rule 56. Gittins' *"review of the Defendant 's account in this matter"* does not qualify as personal knowledge, as required by Rule 56(e). While Mr. Pett's account, so long as it contains only documents prepared and kept in the ordinary course of business may be admissible, that fact does not mean that Mr. Pett's account is within Gittins' personal knowledge, and Gittins cannot testify from personal knowledge and base her affidavit on her personal interpretation of the alleged contents of Mr. Pett's account. Therefore, any portion of her affidavit that is based on her alleged *"review of the*

Defendant 's account in this matter... " is improper testimony in an affidavit and it should have been stricken by the trial court.

Likewise, any of Gittins' statements in her Affidavit based on her alleged *"review of the Defendant 's account in this matter...* "must be stricken because her affidavit does not contain *"sworn or certified copies of all papers or parts thereof referred to in an affidavit."* as mandated by Rule 56. Therefore, any portion of her affidavit that is based on her alleged *"review of the Defendant 's account in this matter...* "is improper testimony in an affidavit and it should have been stricken by the trial court.

All of Gittins' affidavit after paragraph 3 should have been stricken because all of those subsequent paragraphs are her personal conclusions. Affidavits must be based on personal knowledge of facts not conclusions.

As previously set forth in this Brief, in paragraph 3, page 2, of her affidavit Gittins states: *"Based upon my personal knowledge, memory, and review of the Defendant 's account in this matter, **I have determined the following**:"* (Record, at 31). (Emphasis added). By making the statement *"I have determined the following,"* Gittins is unequivocally stating that everything in her affidavit after paragraph 3 is something that she has personally determined, not that she knows, not even something that she believes or that even she may remember, but something that she has determined. Rule 56 does not permit affidavits to be based on a person's opinion, conclusions or determinations.

Because Gittins unequivocally states that everything in her affidavit after paragraph 3 is something that she has determined, as a matter of law, paragraphs 4 through 14 of her affidavit should have been stricken by the trial court. Statements in an

affidavit that are inadmissible because they are not based on personal knowledge must be stricken.

> *"[I]nadmissible evidence cannot be considered in ruling on a motion for summary judgment," D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989), so an affidavit which does not meet the requirements of rule 56(e) may be subject to a motion to strike. Howick v. Bank of Salt Lake, 28 Utah 2d 64, 65, 498 P.2d 352, 353--54 (1972).*

GNS Partnership v. Fullmer, 873 P.2d 1157 (Ut. App. 1994).

Because Gittins affidavit is not based on personal knowledge, as required by Rule 56, as a matter of law, the trial court was required to strike. Because the trial court failed and refused to strike Gittins affidavit and then relied on her affidavit when ruling on Superior's motion for summary judgment, it erred as a matter of law and committed prejudicial and reversible error when ruling on Superior's motion for summary judgment. Therefore, as a matter of law, this Court must reverse the trial court's grant of summary judgment in favor of Superior.

POINT V
INTERWEST IS NOT ENTITLED TO INTEREST AT THE RATE OR 18%. NOR IS INTEWEST ENTITLED TO RECOVER ANY ALLEGED ATTORNEY'S FEES IN THIS MATTER.

Because Mr. Pett never entered into any signed agreement or contract with Superior whereby he agreed to pay Superior 18% interest or attorney's fees, the trial court erred, as a matter of law, and committed prejudicial and reversible error when it awarded Superior interest at 18% interest and attorney's fees when it improperly and unlawfully granted Superior's motion for summary judgment.

Although Mr. Pett did sign a *"Consent and Conditions of Treatment"* with Cache

Valley Speciality Hospital, he never signed any agreement, of any nature whatsoever with either Intewest or Superior. Mr. Pett did not even know of Interwest's existence or of Superior's existence at the time he signed the *"Consent and Conditions of Treatment"* with Cache Valley Speciality Hospital. A party cannot enter into an agreement or a contract with an unknown party. There can not be a meeting of the minds with an unknown party, and a party cannot be held liable to an assignee if he does not receive notice of an assignment of an alleged debt.[4]

The *"Consent and Conditions of Treatment"* does contain the following language:

> ***1. CONSENT TO TREAT:*** *I consent to the treatment or admission of* _____ *at the Cache Valley Speciality Hospital for services or supplies that have been may be ordered by a licensed professional healthcare provider. I understand that treatment may include but is not limited to: radiological examinations, laboratory procedures, physical therapy, anesthesia,*

---

4. *Notification to a debtor of an assignment of the debt is indispensable if the debtor is to be held liable to the assignee. If the debt is to be discharged by payment to someone other than the creditor because of that assignment, unambiguous notification of the change must be given the debtor;*

   Timing of the notification of an assignment can be critical to the validity of assignment because timing can affect the substantive right of the debtor to offset other credits or defenses the debtor has against the debt. In Time Finance Corp. v. Johnson Trucking Co., 23 Utah 2d 115, 458 P.2d 873, 875 (Utah 1969), notice of an intended assignment was given a debtor's agent prior to the actual execution of the assignment. However, no notice of the actual assignment was given. The Court held that notice of the intended assignment was not valid notice and therefore the assignment itself was not effective. Quoting C.I.T. Corp. v. Glennan, 137 Cal. App. 636, 31 P.2d 430, 431 (1934), the Court explained that "'an assignee, in order to protect himself, cannot remain silent.... [T]o protect his rights, the assignee must notify the debtor of the assignment, since the latter is entitled to all setoffs and defenses he may have or may acquire against the assignor, until he is notified of the assignment.'" Time Fin., 458 P.2d at 876.

Webb v. Brinkerhoff Constr. Co, 972 P.2d 74 (Utah 1988)

nursing care or medical and surgical treatment. I understand that all licensed professional healthcare providers that render service to the patent are responsible and liable for their own acts, orders and omissions, I acknowledge that the hospital has not made no can it make a guarantee of the outcome of treatment.

*2. **FINANCIAL AGREEMENT:** I agree to pay for all services and supplies rendered to the patient in accordance with the rates and financial policies in effect at the time of service. I authorize any overpayment made on this account to be transferred to any other account balance for which I am responsible. I agree to pay interest fees on any unpaid balance after 60 days of discharge or date of service at a rate not to exceed 18% Apr. If this account is assigned to an attorney or collection agency for collection then I agree to pay all collection fees, court costs, and attorney's fees.*

In his affidavit Mr. Pett testifies that he never received any bills from Interwest for any services allegedly provided on his behalf and that he never received any notice that Interwest's claim for its alleged services had been assigned to Superior. (Record, at 55). The trial court even admitted that there was an issue of fact as to whether or not Mr. Pett had any knowledge of any amount he allegedly owes Interwest or that Superior had ever informed him that it had been assigned the alleged debt of Mr. Pett to Interwest. In its December 28, 2006 memorandum decision states:

The rather oblique arguments that the Defendant never received a collection letter or a pre-collection letter, or was billed on a regular basis, has nothing to do with the underlying claim here.

Neither Superior not Interwest provided any copies of any collection letters or billing statements either of them allegedly sent to Mr. Pett. As a basic matter of fact and logic, Mr. Pett could not pay an obligation of which he had no knowledge. Therefore, Mr. Pett cannot be legally required to pay court costs, interest and attorney's fees on an alleged debt of which he had no knowledge. A notice of an alleged obligation and a demand for payment must made before an alleged creditor is permitted to file a lawsuit in

order to extract court costs, interest and attorney fees from an alleged debtor.

Therefore, even assuming that Altius did not pay Interwest for any services allegedly provided on Mr. Pett's behalf or did not pay the entire amount Interwest claims it is owed for any services allegedly rendered on behalf of Mr. Pett, neither Interwest nor Superior were entitled to file suit against Mr. Pett without first notifying Mr. Pett of the alleged obligation and giving him the opportunity to dispute or pay the alleged obligation. Neither Interwest nor Superior are entitled to simply file suit against Mr. Pett without first notifying him of alleged obligation, *Webb v. Brinkerhoff Constr. Co,* supra. Therefore, not only is Superior not entitled to court costs, interest and/or attorney's fees, the alleged assignment to Superior by Interwest is invalid without proper notice to Mr. Pett of the alleged assignment, *Webb v. Brinkerhoff Constr. Co,* supra.

Because there is a genuine issue of fact as to whether or not either Interwest or Superior ever notified Mr. Pett that he allegedly owed Interwest for any services allegedly provided on his behalf, the trial court erred as a matter of law, in awarding Superior court costs, interest at 18% and attorney's fees, when it improperly and unlawfully granted Superior's motion for summary judgment. Therefore, as a matter of law, this Court must reverse the trial court's grant of summary judgment in favor of Superior and reverse the trial court's award of court costs, interest at 18% and attorney's fees to Superior, as specified in the trial court' improper and unlawful grant of summary judgment in favor of Superior.

CONCLUSION AND REQUEST FOR RELIEF

The trial court erred, as a matter of law, and committed prejudicial and reversible error when it granted Superior's motion for summary judgment. The trial court erred, as a matter of law, and committed prejudicial and reversible error when it weighed disputed facts in this case. The trial court erred, as a matter of law, and committed prejudicial and reversible error when it viewed the disputed facts in this case in the light most favorable to Superior. The trial court erred, as a matter of law, and committed prejudicial and reversible error when it failed to strike the affidavit of Gittins. The trial court erred, as a matter of law, and committed prejudicial and reversible error when it awarded court costs, interest at 18% and attorney's fees to Superior.

Because the trial court erred, as a matter of law, and committed prejudicial and reversible error when it granted Superior's motion for summary judgment, when it weighed disputed facts in this case, when it viewed the disputed facts in this case in the light most favorable to Superior, and when it awarded court costs, interest at 18% and attorney's fees to Superior, this Court must, as a matter of law, reverse the trial court's grant of summary judgment in favor of Superior. Therefore, Mr. Pett respectfully requests that this Court issue an order reversing the trial court's grant of summary judgment in favor of Superior and remand this matter back to the district court for further proceedings.

Respectfully submitted this 11th day of November 2007.

Charles A. Schultz
Attorney for James E. Pett

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November 2007, I served two true and correct copes of the foregoing Brief to the person(s) at the address(es) below, by depositing a copy(s) in the United States mail, postage prepaid, addressed as follows:

Jonathan P. Thomas
31 Federal Ave.
Logan, UT 84321

Charles A. Schultz
Attorney for James E. Pett

APPENDIX

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

SUPERIOR RECOVERY SERVICES vs. JAMES PETT

CASE NUMBER 060100241 Debt Collection

CURRENT ASSIGNED JUDGE
GORDON J LOW

PARTIES

Plaintiff - SUPERIOR RECOVERY SERVICES
P.O. BOX 285
LOGAN, UT 84323
Represented by: JONATHAN P THOMAS

Defendant - JAMES PETT
640 S 200 W
BRIGHAM CITY, UT 84302
SSN: xxx-xx-5081
Represented by: CHARLES A SCHULTZ

ACCOUNT SUMMARY

TOTAL REVENUE Amount Due: 255.00
Amount Paid: 255.00
Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COMPLAINT 0K-2K
Amount Due: 50.00
Amount Paid: 50.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: APPEAL
Amount Due: 205.00
Amount Paid: 205.00
Amount Credit: 0.00
Balance: 0.00

CASE NOTE

PROCEEDINGS

02-01-06 Filed: Complaint With Exhibit A 0-2K louisen
02-01-06 Filed: Cover Sheet For Civil Filing Actions katieb

02-01-06 Filed return: Return of Service on Summons katieb
Party Served: PETT, JAMES
Service Type: Personal
Service Date: January 30, 2006
02-01-06 Case filed louisen
02-06-06 Judge LOW assigned. louisen
02-07-06 Fee Account created Total Due: 50.00 louisen
02-07-06 COMPLAINT 0K-2K Payment Received: 50.00 louisen
Note: Code Description: COMPLAINT 0K-2K
02-17-06 Filed: Answer angeladb
JAMES PETT

03-07-06 Notice - NOTICE for Case 060100241 ID 8787578 jillfb
We are unable to enter the default judgment/certificate in this case for the following reasons:

An Answer has been filed by the defendant.

Dated this ____ day of _____, 20____.

_____
District Court Clerk

07-21-06 Notice - Notice of Intent for Case 060100241 tonyas
Clerk: TONYA SHIELDS
Notice is hereby given that, due to inactivity, the above entitled matter may be dismissed for lack of prosecution. Unless a written statement is received by the court within 20 days of this notice showing good cause why this should not be dismissed, the court will dismiss without further notice.
07-31-06 Filed: Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment tonyas
07-31-06 Filed: Memorandum of Points and Authorities tonyas
07-31-06 Filed: Affidavit of Wendy Gittins tonyas
08-17-06 Filed: Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment tonyas
08-21-06 Filed: Submission of Defendant's Exhibit No. 1 tonyas
08-28-06 Filed: Reply Memorandum tonyas
08-30-06 Filed: Request to Submit for Decision tonyas
09-01-06 Filed order: Memorandum Decision tonyas
Judge jlow
Signed September 01, 2006

09-05-06 Filed: Motion to Strike the Affidavit of Wendy Gittins tonyas
09-05-06 Filed: Memorandum in Support of Motion to Strike the Affidavit of Wendy Gittins tonyas
09-13-06 Filed: Memorandum in Opposition (Motion to Strike the Affidavit of Wendy Gittins) tonyas
12-12-06 Filed: Memorandum Of Costs And Disbursements (Through Judgment) tonil
12-12-06 Filed: Affidavit Of Attorney's Fees tonil
12-20-06 Filed order: Findings Order and Judgment tonyas
Judge jlow
Signed December 20, 2006
12-20-06 Judgment #1 Entered tonyas
Note: Interest is 18%
Creditor: SUPERIOR RECOVERY SERVICES
Debtor: JAMES PETT
2,400.59 Total Judgment
2,400.59 Judgment Grand Total
12-20-06 Case Disposition is Judgment tonyas
Disposition Judge is GORDON J LOW tonyas
12-20-06 Filed: Objection to Findings of Facts tonyas
12-28-06 Filed order: Memorandum Decision tonyas
Judge jlow
Signed December 28, 2006
12-29-06 Filed: Notice of Entry and Certificate of Service tonyas
12-29-06 Filed: Memorandum of Costs and Disbursements tonyas
12-29-06 Issued: Abstract of Judgment tonyas
Clerk tonyas
01-02-07 Filed: Judgment Information Statement tonyas
01-09-07 Filed order: Order tonyas
Judge jlow
Signed January 09, 2007
01-29-07 Filed: Notice of Appeal louisen
01-29-07 Fee Account created Total Due: 205.00 louisen
01-29-07 APPEAL Payment Received: 205.00 louisen
Note: Code Description: APPEAL

Jonathan P. Thomas (8513)
JONATHAN P. THOMAS, P.C.
Attorney for Plaintiff
31 Federal Avenue
Logan, Utah 84321
Telephone: (435) 792-4505
File No.: C05-436
Superior No.: 18951

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR CACHE COUNTY, STATE OF UTAH

SUPERIOR RECOVERY SERVICES, INC.,	COMPLAINT
Plaintiff,	
vs.	Case No.
JAMES PETT	Judge: Clint S. Judkins Gordon J. Low Thomas L. Willmore
Defendant.	

The Plaintiff, Superior Recovery Services, Inc., ("Superior"), hereby complains of James Pett (the "Defendant") and for cause of action alleges the following:

PARTIES

1. Superior is a Utah corporation duly licensed as a collection agency.

2. The Defendant is an individual residing in County, State of Utah.

JURISDICTION & VENUE

3. Venue is proper in this court because this action involves services and supplies that were provided in Cache County, State of Utah, and a contract that was executed in Cache County, State of Utah.

GENERAL FACTUAL ALLEGATIONS

4. The Defendant, or a member of the Defendant's family, obtained services and supplies from the Plaintiff's assignor, Interwest Anesthesia, in Cache County, Utah.

5. At that time, the Defendant promised to pay for these services and supplies, and signed an agreement (the "Agreement"), a copy of which is attached hereto and incorporated by reference as Exhibit "A."

6. The Defendant breached the Agreement by not paying for the services and supplies.

7. The services and supplies obtained by the Defendant, or the Defendant's family, constitute a family expense and are the legal responsibility of the Defendant as provided by §30-2-9, Utah Code.

8. The Defendant has failed to pay the debt, despite repeated demands to do so.

9. The Agreement, which provides that the Defendant is liable for court costs, the costs of collection, contract interest, and the attorney's fees incurred in the collection process.

10. The Defendant's unpaid account was duly and regularly assigned to Superior, which included a collection fee.

11. The Agreement provides for interest at the rate of 18%, per annum, and Superior is entitled to interest at the contract rate both before and after judgment.

12. In the event the Defendant fails to timely defend against this action and a default judgment is entered, Superior, pursuant to Rule 73 of the Utah Rules of Civil Procedure, elects such attorney's fees in the amount consistent with this Rule.

13. However, Superior reserves the right to submit an affidavit for actual attorney's fees and to motion the Court for reasonable augmented costs and attorney's fees.

FIRST CLAIM FOR RELIEF

14. Superior hereby incorporates Paragraphs 1-13 by reference.

15. As of the filing of this action, the Defendant owes Superior:

$627.04	Unpaid Principal
$29.44	Accrued Interest at 18.00% (Through January 10, 2006)
$317.57	Collection Fee
$75.00	Accrued costs to date (Filing fee: $50.00 Estimated Service Fee: $25.00)
$250.00	Attorney's fees to date
$0.00	Less Payments Made
$1,299.05	TOTAL AMOUNT DUE

PRAYER FOR RELIEF

WHEREFORE, Superior demands judgment against the Defendants as follows:

1. Superior be granted relief in accordance with the aforesaid allegations.

2. For judgment against Defendant in the amount of $1,299.05, and all additional sums, including accruing interest at the Agreement rate, court costs, and costs of collection, and attorney's fees accrued subsequent to the filing of this action.

3. For such further relief as the Court deems just and equitable.

DATED January 10, 2006.

JONATHAN P. THOMAS, P.C.

Jonathan P. Thomas
Attorney for Plaintiff

Defendant:

James Pett
640 South 200 West
Brigham City, Utah 84302

File # C05-436, jpb

Charles A. Schultz (4760)
Attorney for James E. Pett
222 West 700 South
Brigham City, Utah 84302
Phone: 435.225.2636

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, LOGAN DEPARTMENT

SUPERIOR RECOVERY SERVICE, INC., **Plaintiff,** **vs.** **JAMES E. PETT,** **Defendant.**	*ANSWER* **Case No.** **Judge:**

COMES NOW, James Pett and answers the plaintiff's complaint as follows:

FIRST DEFENSE

The plaintiff's complaint fails to state a cause of action upon which relief may be granted.

7. Mr. Pett denies that the plaintiff's assignor ever provided any services to him. Mr. Pett is without knowledge as to whether or not the plaintiff's assignor ever provided services on behalf of the defendant's family members and therefore denies the allegations set forth in paragraph 7 of the plaintiff's complaint. Additionally, Mr. Pett affirmatively asserts that he never entered into any agreement with the plaintiff's assignor.

8. Mr. Pett denies the allegations contained in paragraph 8 of the plaintiff's complaint. Mr. Pett affirmatively asserts that he never received any bills, letters or requests for payment from the plaintiff's assignor.

9. Mr. Pett denies the allegations contained in paragraph 9 of the plaintiff's complaint. Mr. Pett affirmatively asserts that he never entered into any agreement or contract with the plaintiff's assignor.

10. Mr. Pett denies the allegations contained in paragraph 10 of the plaintiff's complaint.

11. Mr. Pett denies the allegations contained in paragraph 11 of the plaintiff's complaint. Mr. Pett affirmatively asserts that he never entered into any agreement or contract with the plaintiff's assignor.

12. Mr. Pett denies the allegations contained in paragraph 12 of the plaintiff's complaint.

13. Mr. Pett denies the allegations contained in paragraph 13 of the plaintiff's complaint.

14. In response to paragraph 14 of the plaintiff's complaint, Mr. Pett reasserts his

SIXTH DEFENSE
(BREACH OF CONTRACT)

Mr. Pett affirmatively asserts that the plaintiff's assignor breached any contract with him by failing and refusing to bill his insurance company for any services allegedly provided to his family, as was agreed when Mr. Pett agreed to permit Cache Valley Speciality Hospital to provide services to a member of his family.

SEVENTH DEFENSE
(UNCLEAN HANDS)

Ms. Pett affirmatively asserts that the plaintiff and/or the plaintiff's assignor are bared by the Doctrine of Unclean Hands from complaining against him, for the reason that the plaintiff and/or the plaintiff's assignor have failed and refused to do justice to Mr. Pett and may not now ask for justice for themselves.

EIGHTH DEFENSE
(BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING)

Utah law imposes an obligation of good faith and fair dealing in all contracts. The plaintiff and/or the plaintiff's assignor breached its obligation of good faith and fair dealing by failing to bill Mr. Pett's insurance company for any services allegedly provided to Mr. Pett's family and by failing to inform Mr. Pett that the plaintiff and/or the plaintiff's assignor allegedly rendered any

failure of limitations, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. Mr. Pett specifically preserves these, and all other, affirmative defenses as they are ascertained through further discovery.

WHEREFORE, having fully answered the plaintiff's complaint, Mr. Pett prays that the plaintiff's complaint be dismissed, with prejudice and upon the merits; that Mr. Pett, pursuant to the provisions of U.C.A. Section 78-27-56 and Rule 11 URCP, be awarded his attorney's fees and court costs incurred by himin defending this bad faith, meritless action, filed by the plaintiff and/or its assignor, and for such further and additional relief as the Court deems just and proper.

Dated this _____ day of February 2006.

Charles A. Schultz
Attorney for James E. Pett

Jonathan P. Thomas (8513)
JONATHAN P. THOMAS, P.C.
Attorney for Plaintiff
31 Federal Avenue
Logan, Utah 84321
Telephone: (435) 792-4505
File No.: C05-436
Superior No.: 18951

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR CACHE COUNTY, STATE OF UTAH

SUPERIOR RECOVERY SERVICES, INC.,	
Plaintiff,	MEMORANDUM OF POINTS AND AUTHORITIES
vs.	
	Case No.060100241 DC
JAMES PETT,	
Defendants.	Judge: Gordon J. Low

Pursuant to Rules 7, 12 & 56 of the Utah Rules of Civil Procedure, Plaintiff, Superior Recovery Services, Inc., ("Plaintiff"), by and through its' attorney, Jonathan P. Thomas, respectfully submits the following Memorandum of Points and Authorities in Support of Plaintiff's Motion for Judgment on the Pleadings in the alternative for Summary Judgment.

STATEMENT OF FACTS

1. On or about May 27, 2004, Heather Pett, born September 16, 1999, the Defendant's daughter, in Cache County, State of Utah, obtained services and supplies from Interwest Anesthesia, and the principal charge was $572.00. *Please see the Affidavit of Wendy Gittins*

2. The Defendant promised to pay for these services and supplies, signed a contract (the "Agreement"). *Please see the Affidavit of Wendy Gittins.*

3. The Agreement provides that among the services that may be provided are anesthesia. *Please see the Affidavit of Wendy Gittins.*

4. The Agreement provides that Defendant, in addition to paying for the service and supplies, he is liable for interest at 18% per annum, court costs, the costs of collection, which includes a collection fee, and the attorney's fees incurred in the collection process. *Please see the Affidavit of Wendy Gittins.*

5. The Agreement states under paragraph 2: FINANCIAL AGREEMENT: I agree to pay for all services and supplies rendered to the patient in accordance with the rates and financial policies in effect at the time of service." *Please see the Affidavit of Wendy Gittins.*

6. Paragraph 3 states: "I understand that I am responsible for any and all charges not covered by my insurance policy(s)." *Please see the Affidavit of Wendy Gittins.*

7. Per the terms of the Agreement, and in order to make sure that Interwest Anesthesia is made whole, a collection charge was added to the account in the amount of $317.57 prior to referral to Superior. *Please see the Affidavit of Wendy Gittins.*

8. The Defendant breached the Agreement by not paying for the services and supplies. *Please see the Affidavit of Wendy Gittins.*

9. On or about July 12, 2004 the Defendant's insurance company, Altius, sent a payment, in the amount of $334.62, to Interwest Anesthesia. *Please see the Affidavit of Wendy Gittins.*

10. However, Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provide by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004. *Please see the Affidavit of Wendy Gittins.*

11. Interwest Anesthesia sent statements to the Defendant on a regular basis. On the account statement, when there is a finance charge, those are the dates that we sent statements. Finally, on September 1, 2005, Interwest Anesthesia sent a pre-collection letter to the Defendant, which included a copy of the account statement to day, requesting payment. The Defendant did not pay. *Please see the Affidavit of Wendy Gittins.*

ARGUMENT

The Defendant's daughter received services and supplies from Interwest Anesthesia, and neither the Defendant nor the Defendant's insurance have paid for these services and supplies.

The Defendant is responsible for this account for two reasons. First, he signed the Agreement to be responsible. The Agreement clearly states: "I agree to pay for all services and supplies rendered to the patient . . . "

The second is based upon the following code section.

§78-45-3 U.C.A. provides:

> Duty of man.
>
> (1) Every father shall support his child and every child shall be presumed to be in need of the support of his father. Every man shall support his wife when she is in need.
> (2) Except as limited in a court order under Section 30-3-5, 30-4-3, or 78-45-7.15:
> (a) The expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and other necessities are chargeable upon the property of both parents, regardless of the marital status of the parents.
> (b) Either or both parents may be sued by a creditor for the expenses described in Subsection (2)(a) incurred on behalf of minor children.

The languages of the above code section is clear. Simply, parents are responsible for their children.

Additionally, in the case of *Ottley v. Hill*, 446 P.2d 301 (Utah 1968), Mr. Ottley's son, who was 4 years of age at the time, was killed when he was struck by an automobile operated by

defendant Hill. The plaintiff had maintained a medical insurance policy which included coverage for his son. At trial, the trial court found that the plaintiff incurred $1,180.80 in medical expenses and $525.76 in funeral expenses, for a total of $1,706.56 for his son. The plaintiff had maintained two insurance policies covering his son, one auto, which paid the plaintiff $500.00, and one medical, which paid the plaintiff $1,009.30, for a total of $1,509.30. The trial court ruled that under the terms of the insurance policy, the plaintiff's son was a beneficiary, which meant that the benefits were part of his estate. The trial court then deducted the medical expenses and funeral expenses ($1,706.56) from what was paid under the insurance policies ($1,509.30), and awarded the plaintiff special damages representing the difference ($197.26). id at 397-398.

On appeal, the Utah Supreme Court ruled that the trial court erred in deducting from the special damages the amount received by the plaintiff from the insurance carriers, stating that:

> It was the duty of the plaintiff to support his son [citing Burbidge v. Utah Light & Traction, Co., 196 P. 556], if he is able to do so, and that duty is imposed by statute in this State [citing §30-2-9 U.C.A.; §78-45-3 U.C.A.; and §78-45-4 U.C.A.]. The duty of support includes the duty of furnishing medical care and treatment. The plaintiff being under a legal duty to pay and discharge the costs of medical care and treatment and for the burial of his son, he is entitled to recover from the defendant those amounts reasonably expended for that purpose. Had there been no insurance the plaintiff would have been entitled to recover his out-of-pocket expenditures for medial care and for burial of his child without questions. The fact that the plaintiff at his own expense carried insurance to protect against such contingencies should not inure to the benefit of the wrongdoer [citing Phillips v. Bennett, 439 P.2d 457]..

Additionally, in the case of in the case of *Berow v. Shields*, 159 P. 538, 539 (Utah 1916), the Utah Supreme Court stated that in regard to a claim for recovery based upon "family expenses" and whether or not they are "necessaries", the Court stated: ". . . all that is required by the statue is that the things purchased are legitimate or proper family expenses."

Therefore, the Defendant is responsible for the unpaid portions because, pursuant to §78-45-3 U.C.A., he is responsible for the medial services and supplies to his son.

Additionally, the Agreement provides: "I agree to pay interest fees on any unpaid balance . . . at a rate not to exceed 18% apr."

Moreover, the Agreement provides: "If this account is assigned to an attorney or a collection agency for collection then I agree to pay all collection agency fees, court costs, and attorney's fees."

CONCLUSION

In sum, judgment should enter in favor of the Plaintiff and against the Defendant consistent with the terms of the Agreement, the Plaintiff's Complaint, and as set forth in this Memorandum and the Affidavit of Wendy Gittins.

DATED this 25 day of July, 2006.

JONATHAN P. THOMAS, P.C.

Jonathan P. Thomas
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I mailed, first class and postage prepaid, a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES, to:

Charles A. Schultz
Attorney at Law
222 West 700 South
Brigham City, Utah 84302

DATED this 31 day of July, 2006.

Charles A. Schultz (4760)
Attorney for James E. Pett
222 West 700 South
Brigham City, Utah 84302
Phone: 435.225.2636

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, LOGAN DEPARTMENT

SUPERIOR RECOVERY SERVICE, INC., Plaintiff, vs. JAMES E. PETT, Defendant.	***MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS* OR IN *THE ALTERNATIVE FOR SUMMARY JUDGMENT*** Case No. 060100241 DC Judge: Gordon J. Low

COMES NOW, James Pett and submits the following Memorandum in opposition to the Plaintiff's motion for judgment on the pleadings or in the alternative for summary judgment (hereinafter, "the plaintiff's motion.").

PRELIMINARY STATEMENT

Although Superior styled its motion as a motion for judgment on the pleadings, it is in fact a motion for summary judgment, because it is based on the affidavit of Gittins. When matters outside of the pleadings are submitted in conjunction with a motion to dismiss, *"Rule 12 requires that the motion be treated as one for summary judgment and disposed of as provided in Rule 56 Utah R. Civ. P. 12(b), (c),"* DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 838 n. 3 (Utah 1996).

> *Rule 12(b) of the Utah Rules of Civil Procedure provides:*
>
> *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. According to this rule, even though defendant's motion was initially for dismissal because of plaintiffs' failure to state a claim upon which relief could be granted under Rule 12(b), once the ancillary complaint which was outside the pleadings was presented to and not excluded by the court, the motion was properly treated as one for summary judgment under Rule 56. Even where a motion is erroneously characterized as a motion to dismiss, if matters outside the pleadings are presented and not excluded, the motion is properly treated as one for summary judgment.*

Strand v. Associated Students of University of Utah, 561 P.2d 191 (1977), see also Bekins Bar V Ranch v. Utah Farm Production Credit Ass'n., 587 P.2d 151 (Utah 1978); Hughes v. Housely, Utah. 599 P.2d 1250 (1979); Harvey v. Sanders, Utah, 534 P.2d 905 (1975); Lind v. Lynch 665 P.2d 1276 (Utah, 1983). Therefore, superior's motion for judgment on the pleadins must be

reviewed and examined under the standard for a summary judgment motion rather than a motion for judgment under Rule 12(c).

STATEMENT OF DISPUTE FACTS

1. Mr. Pett disputes the assertions set forth in paragraph 1 of the plaintiff's statement of facts, set forth in plaintiff's *"Memorandum of Points and Authorities,"* (hereinafter, *"plaintiff's memorandum."* Paragraph 1 of the plaintiff's statement of facts is based on the affidavit of a Wendy Gittins and her affidavit is based on her review and personal interpretation of alleged entries in alleged documents allegedly prepared by the plaintiff. However, Gittins does not claim that she was present when Ms. Pett was allegedly given any treatment or that she prepared any of the documents on which she relies in making her assertions, set forth in her affidavit. Therefore, her personal interpretation of the meaning of the contents of any alleged documents allegedly prepared by the plaintiff does not establish any fact, even assuming the documents on which she allegedly relied are in fact true and accurate that may be admissible under hearsay exceptions. The alleged documents speak for themselves and any possible hearsay exception to their admissibility does not make their alleged contents undisputed facts.[1]

2. Mr. Pett disputes the assertions set forth in paragraph 2 of the plaintiff's statement of facts. Mr. Pett never signed any contract or agreement with the plaintiff. See the affidavit of

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1. Exhibit A to Gittins' affidavit, termed a *"Patient Ledger Analysis,"* appears to be a document created expressly for purposes of this litigation, rather than a document that is prepared and kept in the ordinary course of business.

James Pett, a copy of which is attached to this Memorandum as Exhibit 1. Furthermore, the document attached to Gittins affidavit as Exhibit B is not an agreement between Mr. Pett and the plaintiff, as the plaintiff falsely claims. It is an agreement between Mr. Pett and Cache Valley Speciality Hospital.

3. Mr. Pett disputes the assertions set forth in paragraph 3 of the plaintiff's statement of facts to the extent that those assertions imply that Mr. Pett ever entered into any contract for agreement with the plaintiff for any services. See Exhibit 1. Furthermore paragraph 3 is simply Gittins' personal interpretation, opinion, and conclusion. It is not as statement of fact.

4. Mr. Pett disputes the assertions set forth in paragraph 4 of the plaintiff's statement of facts to the extent that those assertions imply that Mr. Pett ever entered into any contract for agreement with the plaintiff for any services. See Exhibit 1. Furthermore paragraph 4 is simply Gittins' personal interpretation, opinion, and conclusion. It is not as statement of fact.

5. Mr. Pett disputes the assertions set forth in paragraph 5 of the plaintiff's statement of facts to the extent that those assertions imply that Mr. Pett ever entered into any contract for agreement with the plaintiff for any services. See Exhibit 1. Furthermore paragraph 5 is simply Gittins' personal interpretation, opinion, and conclusion. It is not as statement of fact.

6. Mr. Pett disputes the assertions set forth in paragraph 6 of the plaintiff's statement of facts to the extent that those assertions imply that Mr. Pett ever entered into any contract for agreement with the plaintiff for any services. See Exhibit 1. Furthermore paragraph 6 is simply Gittins' personal interpretation, opinion, and conclusion. It is not as statement of fact.

7. Mr. Pett admits that the plaintiff added a collection charge in the amount of $327.57, set forth in paragraph 7 of the plaintiff's statement of facts. However, Mr. Pett asserts that the plaintiff had no legal right to do so. See Exhibit 1. Furthermore paragraph 7 is again Gittins' personal interpretation, opinion, and conclusion. It is not as statement of fact.

8. Mr. Pett disputes the assertions set forth in paragraph 8 of the plaintiff's statement of facts to the extent that those assertions imply that Mr. Pett ever entered into any contract for agreement with the plaintiff for any services. See Exhibit 1. Furthermore paragraph 6 is simply Gittins' personal interpretation, opinion, and legal conclusion. It is not as statement of fact.

9. Mr. Pett is without knowledge as to whether or not his insurance carrier paid the plaintiff the sum of $334.62 to the plaintiff on July 12, 2004; however, Gittins claim that it did does not make her claim a fact.

10. Mr. Pett disputes the assertions set forth in paragraph 10 of the plaintiff's statement of facts. Mr. Pett never received any payment from his insurance carrier. His insurance carrier does not make direct payments to its insured. See Exhibit 1. Additionally Mr. Pett disputes the plaintiffs assertion that his insurance carrier retracted the alleged July 12, 2004 payment to the plaintiff on July 31, 2005, some 384 days after it made the alleged payment to the plaintiff.

11. Mr. Pett disputes the assertions set forth in paragraph 11 of the plaintiff's statement of facts. Mr. Pett has never received any letters from the plaintiff or its assignor Interwest Anaesthesia. The first Mr. Pett knew that Interwest was claiming he had an outstanding bill is when he was served with a summons and complaint in this matter. See Exhibit 1.

ARGUMENT

THERE ARE GENUINE ISSUES OF MATERIAL FACT PRESENT IN THIS CASE WHICH PRECLUDE THIS COURT FROM ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF AND THE PLAINTIFF HAS NOT ESTABLISHED THAT IT IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW. THEREFORE, THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

POINT I

THERE IS A GENUINE ISSUE AS TO WHETHER OR NOT THE PLAINTIFF WAS PAID FOR ANY MEDICAL SERVICES ALLEGEDLY PROVIDED TO MR. PETT'S DAUGHTER. THEREFORE, THE PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS MATTER.

On page 2, ¶ 9, of the plaintiff's statement of facts, set forth in its memorandum of points and authorities (hereinafter, "plaintiff's memorandum"), the plaintiff claims that it was paid the sum of $334.62 by Mr. Pett's insurance carrier on July 12, 2004. Then on page 2, ¶ 10, page 2 of the plaintiff's statement of facts, set forth in its memorandum the plaintiff claims that Mr. Pett's insurance carrier *"However, Altius retracted that payment on July 31, 2005...."*

It is not reasonable or logical to assume that Mr. Pett's insurance carrier could or would retract a payment it made to Interwest 384 days earlier, and the plaintiff offers no explanation as to how Mr. Pett's insurance carrier was able to retract a payment it made more than a year earlier.

Checks are required to clear a bank within 48 hours. Did Interwest not deposit Mr. Pett's insurance carrier's payment for more than a year? Does Mr. Pett's insurance carrier have direct access to Inerwest's back account, permitting it make deposits and withdrawals as it sees fit? If not, how could it retract a payment it made 384 days earlier without Inerwest's consent and authority?

There is no evidence that Mr. Pett's insurance carrier ever withdrew the payment the plaintiff admits it made to Interwest. Gittins' self-serving allegations, set forth in her affidavit, do not establish that Mr. Pett's insurance carrier ever "retracted" any payment to Interwest, and, likewise, the alleged *"Patient Ledger Analysis"* does not establish as a matter of fact that Mr. Pett's insurance carrier ever "retracted" any payment to Interwest. If the plaintiff is going to claim that Mr. Pett's insurance carrier "retracted" any payment to Interwest, it must provide proof in the form of bank statements showing that the payment, it admits Interwest received from Mr. Pett's insurance carrier, was ever "retracted, as the plaintiff claims.[2]

Because there is a genuine issue of material fact as to whether or not Interwest was paid by Mr. Pett's insurance carrier, as a matter of law, this Court cannot grant the plaintiff's motion for summary judgment. Therefore, the plaintiff's motion for summary judgment must be denied.

POINT II

MR. PETT NEVER SIGNED ANY CONTRACT OR AGREEMENT WITH INTERWEST FOR ANY TYPE OF SERVICES.

Contrary to the plaintiff's assertions, Mr. Pett never signed any contract with Interwest whereby he agreed to pay Interwest for any goods, services, materials, supplies or other items allegedly provided to him or on his behalf. And Interwest never billed Mr. Pett for any goods,

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2. Likewise, if the plaintiff is going to claim that Mr. Pett received $514.80 from his insurance carrier on February 25, 2005, it must provide proof of the alleged payment, i.e., a canceled check with Mr. Pett's signature on it depositing it in his bank account or cashing it.

services, materials, supplies or other items allegedly provided to him or on his behalf. See Exhibit 1.

Although the plaintiff claims that Intewest sent Mr. Pett *"statements on a regular basis,"* it has not included any copies of those alleged *"statements"* in the documents it has provided to Mr. Pett or filed with the Court. Likewise, the plaintiff has failed to provide either the Court or Mr. Pett with the *"pre-collection letter"* it claims it allegedly sent to Mr. Pett on September 1, 2005. If Interwest truly sent Mr. Pett *"statements on a regular basis "* and/or a *"pre-collection letter"* it was required to attach copies of those alleged documents to its "memorandum" when it filed its "motion." The plaintiff cannot simply rely on Gittins' interpretation of the *"Patient Ledger Analysis"* as a factual basis that Interwest ever sent Mr. Pett *"statements on a regular basis "* and/or a *"pre-collection letter."*[3]

Mr. Pett cannot be required to pay a debt of which he has no knowledge. See Exhibit 1.

POINT III

MR. PETT CANNOT BE REQUIRED TO PAY A DEBT OF WHICH HE HAS NO KNOWLEDGE AND WHICH SHOULD HAVE BEEN, AND MAY HAVE BEEN, PAID BY HIS INSURANCE CARRIER.

The plaintiff is correct in its claim that a man is required to support his children, and that a man may be required to pay for the medical expenses incurred on behalf of his minor children. However, Mr. Pett is not required to pay a claim for medical expenses of which he has no knowledge and which may have been paid by his insurance company.

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3. Plaintiff's memorandum, page 2, ¶ 11.

Contrary to the plaintiff's assertion, Mr. Pett is not *"responsible for the unpaid portions because, pursuant to §78-45-3 U.C.A., he is responsible for the medical services and supplies to his son."*[4] Mr. Pett has no son. See Exhibit 1. And although Mr. Pett may be required to pay for medical care of his daughter, the plaintiff is not entitled to collect from Mr. Pett without Interwest first informing Mr. Pett of any such obligation and without giving Mr. Pett the opportunity to pay any alleged obligation after it is made known to him.

In the instant matter, there is no evidence that Mr. Pett was ever informed of any claim by Interwest of any alleged outstanding bill or given the opportunity to pay any alleged bill. There is, however, an admission by Inerwest that Mr. Pett's insurance carrier paid Interwest.[5] Mr. Pett cannot pay a debt of which he has no knowledge. See Exhibit 1.

Because there is a genuine issue of material fact as to whether or not Mr. Pett was ever informed of any alleged obligation to pay Interwest for any alleged services and because there is a genuine issue as to whether Interwest was in fact paid for any alleged services provided to or on behalf of Mr. Pett, this Court cannot grant the plaintiff's motion for summary judgment, based on the provisions in the Utah Code that require a man to provide for his minor children and to pay their medical expenses.

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4. Plaintiff's memorandum, page 5, ¶ 1.

5. Plaintiff's memorandum, page 2, ¶ 9.

POINT V

INTERWEST IS NOT ENTITLED TO INTEREST AT THE RATE OR 18%. NOR IS INTEWEST ENTITLED TO RECOVER ANY ALLEGED ATTORNEY'S FEES IN THIS MATTER.

Mr. Pett never entered into any signed agreement or contract with Interwest whereby he agreed to pay Intewest 18% interest, as the plaintiff falsely claims. Likewise, Mr. Pett never into any signed agreement or contract with Interwest whereby he agreed to pay Interwest's attorney's fees should his insurance carrier fail to pay for any treatment covered under his health care policy

The *"Agreement"* to which the plaintiff refers is not between Interwest and Mr. Pett. It is between Mr. Pett and Cache Valley Speciality Hospital. Mr. Pett could not have entered into an agreement with Inerwest at the time he signed the *"Consent and Conditions of Treatment"* which is an agreement between Mr. Pett and Cache Valley Speciality Hospital. Mr. Pett did not even know of Interwest's existence. A party cannot enter into an agreement or a contract with an unknown party.

Because Mr. Pett never entered into any contract or agreement with Interwest that provides for interest at 18% or for recovery of attorney's fees, the plaintiff is not entitled, under any circumstances to collect interest at the rate of 18% or to recover any attorney's fees from Mr. Pett. Therefore, the plaintiff's assertion that it is entitled to recover interest at the rate of 18% or to recover any attorney's fees from Mr. Pett must be summarily denied.[6]

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6. Even assuming, arguendo, that the terms of the *"Consent and Conditions of Treatment"* enured to the benefit of Interwest, those terms do not enure to the benefit of the plaintiff. If Interwest had sued Mr. Pett in its own name, as plaintiff, it could perhaps claim that the terms of the *"Consent and Conditions of Treatment"* enured to the benefit

CONCLUSION

Because there are genuine issues of material fact present in this case, and because the plaintiff is not entitled to summary judgment as a matter of law, the plaintiff's motion for summary must be summarily denied.

Dated this 15th day of August 2006.

Charles A. Schultz
Attorney for James E. Pett

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of Interwest. However, when the plaintiff chose to file the instant action in its own name any arguable obligations Mr. Pett had under the the *"Consent and Conditions of Treatment"* did not transfer to the benefit of the plaintiff.

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of August, I mailed a true and accurate copy of the foregoing Memorandum to the person(s) at the address(es) listed below by depositing a copy in the United States Mail, postage prepaid.

Jonathan P. Thomas
31 Federal Ave.
Logan, UT 84321

Charles A. Schultz
Attorney for James E. Pett

AFFIDAVIT

STATE OF ~~UTAH~~

.ss

COUNTY OF BOX ELDER }

James Pett, being first sworn upon his oath, deposes and states as follows:

1. I, James Pett, have personal knowledge of the facts set forth in this Affidavit and would so testify if called to do so at trial of this matter.

2. I have read the affidavit of Wendy Gittins, and many of the things she states in her affidavit are false.

3. I never signed any agreement with Interwest Anesthesia Agreement for service of any type.

4. I never promised to pay Interwest any amount for anything, as Gittins states in paragraph 5 of her affidavit.

5. I never even knew that Interwest provided any services to any member of my family.

6. I never knew that Interwest existed until this lawsuit.

7. The "Consent and Conditions of Treatment" attached to Gittins' affidavit is not an agreement to pay Interwest, as Gittins falsely claims. It is an agreement for consent for treatment and conditions of treatment with Cash Valley Speciality Hospital. Interwest is not even mentioned in the "Consent and Conditions of Treatment."

8. Gittins' statements contained in paragraphs 6 through are not true. They deal with the "Consent and Conditions of Treatment" with Cash Valley Speciality Hospital, not Interwest.

9. Gittins' claim, as set forth in paragraph 13 of her affidavit, that on February 25, 2005, Altius paid me $514,80, is not true. I have never received any payment from Altius in the fifteen years I have been covered by their insurance.

10. I have never received any bills from Interwest, as claimed by Gittins in paragraph 14 of her affidavit, and I do not believe any were ever sent.

11. I never received a *"pre-collection letter,"* as claimed by Gittins in paragraph 14 of her affidavit, and I do not believe any were ever sent.

12. I did not know that Interwest was claiming that I owed them any amount of money or that they were claiming that Altius failed to pay them for any services allegedly provided to my daughter, Heather, until I was served with a summons and complaint from Superior.

13. I have no way of knowing if Altius paid Interwest $334.62 on July 12, 2004, as Gittins claims in paragraph 12 of her affidavit, however, I never received $514.80 from Altius on February 25, 2005. I would remember if, out of the blue, anyone sent me a check for $514.80, and if Interwest claims Altius did, where is a copy of the check with my signature on it?

14. Contrary to Superior's false claim, I do not have a son, and I have never had a son.

15. I have never signed any contracts or agreements with Superior for anything, and I would never do so.

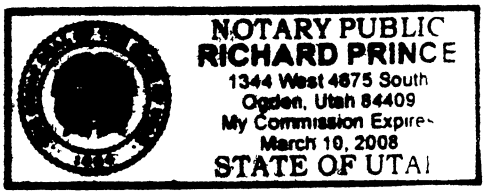
16. I never knew that Superior existed until I was served with a summons and complaint in this lawsuit.

Dated this 17 day of August 2006

James E. Pett

Sworn and subscribed to this 17 day of August 2006

Notary Public



In the First Judicial District Court
In and for Cache County, State of Utah

SUPERIOR RECOVERY SERVICES, INC., Plaintiff,	MEMORANDUM DECISION
vs.	Case Number: 060100241 DC
JAMES PETT, Defendant.	JUDGE: GORDON J. LOW

THE ABOVE MATTER is before the Court upon a motion filed by the Plaintiff on July 31, 2006 styled *Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment,* but it is more appropriately considered to be a Motion for Summary Judgment.

For the reasons set forth in the Plaintiff's *Memorandum of Points and Authorities* and its *Reply Memorandum*, the motion is granted. The Court would suggest that the defenses raised in the *Memorandum in Opposition* appear to be disingenuous. The Plaintiff is granted judgment as plead, including interest, costs, and attorney's fees.

The Court solicits from counsel for the Plaintiff a formal order in conformance herewith, together with an Affidavit in support of its claim for attorney's fees.

Dated this 1st day of September, 2006.

BY THE COURT

Gordon J. Low, District Court Judge
First District Court

2006-08-31/GJL/ts

Charles A. Schultz (4760)
Attorney for James E Pett
222 West 700 South
Brigham City, Utah 84302
Phone 435.225.2636

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, LOGAN DEPARTMENT

SUPERIOR RECOVERY SERVICE, INC.,	*OBJECTION TO FINDINGS OF FACTS*
Plaintiff,	
vs.	
JAMES E. PETT,	Case No. 060100241 DC
Defendant.	Judge. low

COMES NOW, James Pett and objects to the plaintiff's proposed findings of fact on the following grounds:

1. Although the court ordered the plaintiff to prepare findings of facts, the plaintiff in fact prepared no findings of fact. Mr. Pett admits that it would be extremely difficult for the plaintiff to prepare any findings of fact, because the court never specified any facts in its memorandum

decision granting the plaintiff's motion for summary judgment. If the court wants the plaintiff to prepare findings of fact, the court should, at the minimum, give some indication of the "facts" upon which it based its memorandum decision, even though preparation of factual findings on a summary judgment motion is inappropriate. Rule 52(a), U.R.C.P. provides:

> *In all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon . . . .*
>
> *With certain exceptions, not applicable here, the just-quoted rule must be complied with and a judgment cannot stand unless there are findings which will justify it. The failure of the trial court to enter adequate findings requires that the judgment be vacated.*

Anderson v. Utah Cty. Bd. Of Cty. Comm'rs., 589 P.2d 1214 (Utah 1984)

2. It is inappropriate for the court to direct the plaintiff to prepare findings of fact on a summary judgment. On summary judgment, it is inappropriate to make findings of fact or to even decide facts. On summary judgment a court can only determine that there are no disputed facts. It cannot weigh and determine disputed fact, as the court did in this case.

> *"Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." Jones v. ERA Brokers Consol., 2000 UT 61, ¶ 8, 6 P.3d 1129; see also Utah R. Civ. P. 56(c).*

Collard v. Nagle Construction, Inc., 57 P.3d 603 (UT App. 2002).

> *Hearing was had on these pleadings, and the trial court granted summary judgment in favor of Buzas Baseball but also entered findings of fact, which are clearly inappropriate in any grant of summary judgment. By definition, summary judgment cannot be granted where there are disputed facts. Ron Shepherd Ins., Inc. v. Shields, 882 P 2d 650, 654 (Utah 1994) ("Summary judgment is proper only when no genuine issues of material fact remain....").*

Buzas Baseball, Inc v. Salt Lake Trappers, Inc., 925 P.2d 941 (Utah 1996).

3. The plaintiff's proposed finding stating: *"The Court finds that the defenses raised in the Defendants's Memorandum in Opposition appear to be disiingenuous,"* is not a finding of fact. At best it is an improper comment based in the court's impermissible weighing of disputed facts.

> *A trial court is not authorized to weigh facts in deciding a summary judgment motion, but is only to determine whether a dispute of material fact exists, Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995) ("On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist."), viewing the facts and all reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party. Tretheway v. Miracle Mortgage, Inc., 2000 UT 12, ¶2 995 P.2d 599.*

Pigs Gun Club, Inc. v. Sanpete Cty., 42 P.3d 379 (Utah 2001).

For the forgoing reasons the plaintiff's proposed findings, order and judgment should be rejected. Furthermore, for the forgoing reasons, the grant of summary judgment in favor of the defendant should be vacated, as it will be on appeal.

Dated this 19th day of December 2006.

Charles A Schultz
Attorney for James E. Pett

Jonathan P. Thomas (8513)
JONATHAN P. THOMAS, P.C.
Attorney for Plaintiff
31 Federal Avenue
Logan, Utah 84321
Telephone: (435) 792-4505
Fax: (435) 752-3556
Superior No.: 18951

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR CACHE COUNTY, STATE OF UTAH

SUPERIOR RECOVERY SERVICES, INC.,

Plaintiff,

vs.

JAMES PETT

Defendant.

FINDINGS, ORDER, AND JUDGMENT

Case No.: 060100241 DC

Judge: Gordon J. Low

THIS MATTER came before the Court on the Plaintiff's Motion for Judgment on the Pleadings or in he alternative for Summary Judgment, which was supported by the Memorandum of Points and Authorities. The Defendant has not replied. The Plaintiff subsequently submitted an Affidavit of Attorney's Fees, and a Memorandum of Costs and Disbursements. The Court, having reviewed the Motion, Memorandums, and Exhibits, and being otherwise fully advised in the premises, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

FINDINGS

The Court finds that the defenses raised in the Defendant's Memorandum in Opposition appear to be disingenuous.

12-20-06

ORDER

The Plaintiff's Motion is hereby granted.

JUDGMENT

IT IS HEREBY ORDERED that the Plaintiff be awarded Judgment against the Defendants as follows:

$627.04	Unpaid Principal
$131.48	Accrued Interest at 18.00% (Through December 6, 2006)
$317.57	Collection Costs
$94.50	Accrued expenses to date (Filing fee: $50.00 Service Fees: $19.50 Miscellaneous/Copy Fee: $25.00)
$1,230.00	Attorney's fees to date
$0.00	Less Payments Made
$2,400.59	TOTAL AMOUNT DUE

Interest is to accrue on the total judgment at the current judgment interest rate of 18.00% from the date of this Judgment, until paid, plus after-accruing costs.

IT IS FURTHER ORDERED that this Judgment shall be augmented in the amount of reasonable costs and attorney fees expended in collecting said Judgment by execution or otherwise as shall be established by Affidavit.

DATED this 20 day of December, 2006.

BY THE COURT

Gordon J. Low
District Court Judge

Entered

In the First Judicial District Court
In and for Cache County, State of Utah

SUPERIOR RECOVERY SERVICES, INC., **Plaintiff(s),** **vs.** **JAMES E. PETT,** **Defendant(s).**	**MEMORANDUM DECISION** **Case Number: 060100241 DC** **JUDGE: GORDON J. LOW**

THE ABOVE MATTER is before the Court on Defendant's *Motion to Strike the Affidavit of Wendy Gittins*. Procedurally, the Court notes that the initial Complaint was filed on the 1st of February, 2006. Thereafter, Plaintiff filed on the 31st of July a *Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment*. Defendant filed a response to that motion on the 17th of August, to which Plaintiff then replied on 28th of August. This Court then issued a *Memorandum Decision* on the 1st of September, 2006, granting the motion for summary judgment. Defendant then belatedly filed his *Motion to Strike* on the 5th of September, seeking to strike the affidavit supporting Plaintiff's summary judgment motion. In response to this new motion, Plaintiff submitted a response on the 13th of September. No further pleadings with respect to the motion to strike were submitted. A set of *Findings, Order and Judgment* was filed with the Court by the Plaintiff and subsequently entered by the Court on the 20th of December, 2006. An objection thereto was filed by the Defendant later that day.

Defendant's Motion to Strike the Affidavit is late and inappropriate. Leave could have been requested by Defendant if he sought to set aside the Court's memorandum decision or to otherwise attack the judgment. Defendant is correct, however, in arguing that Plaintiff should not have submitted to the Court a set of Findings of Fact. Findings of Fact are not to be provided or

entered by the Court upon motion for summary judgment, as the Court does not weigh the facts when making summary judgment determinations. It should be noted that the Court did not request a set of Findings, but in fact solicited from Plaintiff's counsel a formal order in conformance with the memorandum decision granting the motion for summary judgment.

Concerns raised by Defendant in his Motion to Strike and Opposition to Summary Judgment

Contrary to the suggestion by the Defendant that the Court made the Findings of Fact, the Court observed that the defenses raised in Defendant's memorandum appeared to be disingenuous. By way of explanation, in a review of the Defendant's response to the motion for summary judgment the Court addressed procedural propriety of that motion. The Court agreed that the matter was not for judgment on the pleadings but more properly for a Rule 56 decision. In this light, the submitted statement of facts or memorandum of facts thereafter is less than helpful. Additionally, the affidavit by Mr. Pett does not aid the Court. A statement of facts must be supported by an affidavit, and moreover, must be material or facts pertinent to the issue at hand to preclude summary judgment. Though most of the facts contested in Defendant's statement go to some of the underlying issues, none of them go to the heart of the issue, whether Defendant is indebted for services received.

Defendant's general argument is that genuine issues of material fact exist which preclude the Court from entering a summary judgment. Specifically, Defendant first asserts Plaintiff was paid for the medical services provided to Mr. Pett's daughter and therefore, the Plaintiff is not entitled to summary judgment. Yet, there is no issue of fact with respect to that. The fact Defendant's daughter received services is undisputed and to suggest that "it is not reasonable or logical to assume that Mr. Pett's insurance carrier could or would retract a payment it made to Interwest 384 days earlier, and that Plaintiff offers no explanation as to how Mr. Pett's insurance

carrier was able to retract a payment it made more than a year earlier," does not necessarily raise an issue of fact Simply making a blanket assertion that an insurance carrier retracted a payment does not raise a material issue of fact that Defendant is not obligated for the alleged debt. Some other questions were raised, but there is nothing therein to argue the central point of whether the debt was owed The questions raised as to alleged facts without facts to the contrary does not an issue of fact create.

The second point in the Defendant's argument is that he never signed a contract with Interwest for any type of services. That is not germain to the issue here. There is no claim that he signed an agreement with Interwest for the services. The claim is that he owes Interwest sums for services provided. The rather oblique arguments that the Defendant never received a collection letter or a pre-collection letter, or was billed on a regular basis, has nothing to do with the underlying claim here.

The third point made by the Defendant is that he should not be required to pay a debt for which he has no knowledge of and which should have been, or may have been, paid by his insurance carrier. There is nothing under that allegation to suggest that in fact he never received the services. To suggest that he had no knowledge of the debt, or that it may have been paid by his insurance carrier does not negate the claim by the Plaintiff that the Defendant is indebted and owes for the services provided.

The fourth argument, similar to the third, suggests that the debt wrongly reflected a reference to Defendant's son rather than his daughter again fails to raise a material issue of fact. Defendant was informed in Plaintiff's Complaint of the obligation and Defendant has never denied in his affidavit or otherwise that the services were provided to his child or that they were reasonable. The allegation that he was never informed of the obligation and the question as to

whether Interwest was in fact paid does not an issue of fact create to dispute his underlying obligation.

Defendant's fifth point is that Interwest is not entitled to an interest rate of 18% or any attorney's fees Once again, this argument is oblique There is no allegation that Defendant signed a contract with Interwest or agreed to pay attorney's fees or interest. However, attached to Plaintiff's affidavit of Wendy Gittins is Defendant's undisputed signed agreement with Cache Valley Specialty Hospital. That agreement provided for attorney's fees and interest and was assignable. Not unlike the response to the motion for summary judgment, the Court finds that both the motions to strike the affidavit of Wendy Gittins and the Objection to Findings of Fact are without merit.

This memorandum decision will serve as notice that the Findings, Order and Judgment submitted by the Plaintiff have been modified on the first line under findings to provide that:

> "The Court finds the defenses raised in the Defendant's Memorandum in Opposition appear to be without merit."

Otherwise, the findings will remain as entered on the 20th of December, 2006.

Counsel for the Plaintiff is now directed to prepare an order denying the motion to strike and overruling the objection to the findings of fact.

Dated this 28th day of [illegible], 06.

BY THE COURT

STATE OF UTAH FIRST DISTRICT COURT CACHE COUNTY

Gordon J. Low, District Court Judge
First District Court

2006-12-28/GJL/ts

Jonathan P. Thomas (8513)
JONATHAN P. THOMAS, P.C.
Attorney for Plaintiff
31 Federal Avenue
Logan, Utah 84321
Telephone: (435) 792-4505
File No.: C05-436
Superior No.. 18951

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR CACHE COUNTY, STATE OF UTAH

SUPERIOR RECOVERY SERVICES, INC.,

Plaintiff,

vs.

JAMES PETT,

Defendants.

AFFIDAVIT OF WENDY GITTINS

Case No. 060100241 DC

Judge: Gordon J. Low

STATE OF UTAH)
ss.
County of Cache)

Wendy Gittins, being first duly sworn on oath, deposes and states as follows:

1. That I am a resident of Cache County, State of Utah, I am over the age of 18, I have personal knowledge of the following, except where so stated, and I am competent to testify.

2. I am the office manager of Interwest Anesthesia, a client of Superior Recovery Inc. ("Superior"), which means I have access to all account information regarding James Pett's (the "Defendant") account, and that I am a custodian of the records. The records of the Defendant's account that I reviewed are kept in the course of a regularly conducted business procedure, and it our regular practice to make memorandums, reports, records, or data compilations.

3. Based upon my personal knowledge, memory, and my review of the Defendant's account in this matter, I have determined the following:

4. On or about May 27, 2004, Heather Pett, born September 16, 1999, the Defendant's daughter, in Cache County, State of Utah, obtained services and supplies from Interwest Anesthesia, and the principal charge was $572.00. *A copy of the account statement is attached hereto and incorporated by reference as Exhibit "A."*

5. The Defendant promised to pay for these services and supplies, signed a contract (the "Agreement"). *A copy of which is attached hereto and incorporated by reference as Exhibit "B."*

6. The Agreement provides that among the services that may be provided are anesthesia. *Please see Exhibit A.*

7. The Agreement provides that Defendant, in addition to paying for the service and supplies, he is liable for interest at 18% per annum, court costs, the costs of collection, which includes a collection fee, and the attorney's fees incurred in the collection process. *Please see Exhibit A.*

8. The Agreement states under paragraph 2: FINANCIAL AGREEMENT: I agree to pay for all services and supplies rendered to the patient in accordance with the rates and financial policies in effect at the time of service." *Please see Exhibit A.*

9. Paragraph 3 states: "I understand that I am responsible for any and all charges not covered by my insurance policy(s)." *Please see Exhibit A.*

10. Per the terms of the Agreement, and in order to make sure that Interwest Anesthesia is made whole, a collection charge was added to the account in the amount of $317.57 prior to referral to Superior. *Please see Exhibit A.*

11. The Defendant breached the Agreement by not paying for the services and supplies.

12 On or about July 12, 2004 the Defendant's insurance company, Altius, sent a payment, in the amount of $334.62, to Interwest Anesthesia. *Please see Exhibit A.*

13. However, Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provide by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004. *Please see Exhibit A.*

14. We sent statements to the Defendant on a regular basis. On the account statement, when there is a finance charge, those are the dates that we sent statements. Finally, on September 1, 2005, Interwest Anesthesia sent a pre-collection letter to the Defendant, which included a copy of the account statement to day, requesting payment. The Defendant did not pay. *Please see Exhibit A.*

VERIFICATION

STATE OF UTAH)
:ss.
County of Cache)

Wendy Gittins, being first duly sworn, deposes and says: That she has read the above and foregoing knows the contents thereof and the facts alleged therein are true to her own best knowledge, understanding that she does so under penalty of perjury.

On the 11th day of July, 2006, personally appeared before me, Wendy Gittins, the signer of the written instrument, who duly acknowledged that she executed the same.

NOTARY PUBLIC
GAVN MEADE
My Commission Expires
11-15-2009
P.O. Box 352
Logan Utah 84323
STATE OF UTAH

Notary Public

Run Date: 11/1/2005

InterWest Anesthesia Associates
274 N Main St
Logan, UT 84321-3915 USA

18451

Patient Ledger Analysis

Active Charges Only

PETT HEATHER Patient #: 20,644 Date of Birth 9/16/1993 Phone: (435) 512-1821
Init. Bal: $ 0.00 Ins. Bal: $ 0.00 Pat. Bal. $ 952.71 Total Bal: $ 952.71 SSN:

Charge Seq. #: 66,006 Primary: ALTIUS ALTIUS Secondary:

Charge Amount: $ 572.00 P. Status: Resolved S. Status: Attending Physician: JRR Trans Date: 5/27/200

Item#	From	To	POS	CPT #	Procedure Description	Mod	ICD #	Charges	Days or Units

Charge Balance: $635.14

Trans. Date:5/27/2004 Trans. Seq. #: 66006 Source: Charges Amt: $572.00

5/27/2004 5/27/2004 22 00170 INTRAORAL PROCEDURES P1 474.10 $572.00 11.00

Trans. Date:11/1/2004 Trans. Seq. #: 107253 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $4.60
Interest

Trans. Date:12/1/2004 Trans. Seq. #: 115577 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $3.70
Interest

Trans. Date:1/1/2005 Trans. Seq. #: 123499 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $3.88
Interest

Trans. Date:2/1/2005 Trans. Seq. #: 133259 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $3.94
Interest

Trans. Date:3/1/2005 Trans. Seq. #: 141287 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $3.61
Interest

Trans. Date:4/1/2005 Trans. Seq. #: 150429 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $4.05
Interest

Trans. Date:5/1/2005 Trans. Seq. #: 159975 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $3.98
Interest

Trans. Date:6/1/2005 Trans. Seq. #: 169446 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $4.18
Interest

Trans. Date:7/1/2005 Trans. Seq. #: 178040 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $4.10
Interest

Trans. Date:7/28/2005 Trans. Seq. #: 186218 Item #: 1 Source: Payment - PATIENT PRI INS Amt: $0.00
ALTIUS PAID YOU $514.80 ON 2/25/05. PAYMENT IN FULL IS DUE IMMEDIATELY. ALTIUS IS RETRACTING THE PAYMENT MADE TO US. PLEASE CONTACT US IF YOU HAVE ANY QUESTIONS. THANK YOU!

Trans. Date:7/31/2005 Trans. Seq. #: 187320 Item #: 1 Source: Payment - UNITED UNITED2 R Amt: $334.62
07/31/05 REFUND ALTIUS CK 5254

Trans. Date:8/1/2005 Trans. Seq. #: 188026 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $9.42
Interest

Trans. Date:9/1/2005 Trans. Seq. #: 195723 Source: PC Amt:
PRE-COLLECT LETTER SENT

Trans. Date:9/1/2005 Trans. Seq. #: 195906 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $9.56
Interest

EXHIBIT "A"

Run Date: 11/1/2005

InterWest Anesthesia Associates
274 N Main St
Logan, UT 84321-3915 USA

Patient Ledger Analysis

Active Charges Onl

PLTT HEATHER Patient #: 20,644 Date of Birth: 9/16/1993 Phone: (435) 512-1821
Init. Bal: $ 0.00 Ins. Bal: $ 0.00 Pat. Bal: $ 952 71 Total Bal: $ 952.71 SSN:

Trans. Date:6/10/2004 Trans. Seq. #: 67551 Source: 1st Carrier Claim Generated: ALTIU Amt:
Primary Generated. OutputType: PRINTED

Trans. Date:7/12/2004 Trans. Seq. #: 77896 Item #: 1 Source: Payment - ALTIUS ALTIUS PRI INS Amt: ($334.6
ALTIUS PAYMENT# 6602981

Trans. Date:9/1/2004 Trans Seq. #: 89602 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $7.2(
Interest

Trans. Date:10/1/2004 Trans. Seq. #: 99069 Item #: -1 Source: Adjustment - PATIENT FINANCE Amt: $0.8(
Interest

Charge Seq. #: 212,619 Primary: Secondary:

Charge Amount: $ 317.57 P. Status: S. Status: Attending Physician: JRR Trans. Date: 11/1/200

Item#	From	To	POS	CPT #	Procedure Description	Mod	ICD #	Charges	Days or Unit

Charge Balance: $317.57

Trans. Date:11/1/2005 Trans. Seq. #: 212619 Source: Charges Amt: $317.57

11/1/2005	11/1/2005	22	COLL	ACCOUNT TO COLLECTIONS	0		$317 57	1.00

Consent and Conditions of Treatment

Cache Valley Speciality Hospital

Thank you for choosing Cache Valley Speciality Hospital to provide for your healthcare needs. We are committed to providing exceptional healthcare. The first step in this process is to provide information regarding patient rights, risks and responsibilities. The second step is to obtain your consent to treat the patient. The admitting staff can answer any questions you may have in regards to the following agreement.

Cache Valley Specialty Hospital
CV00000095450 PETT,HEATHER
DOB 09/16/1993 AGE 10 SEX 1 CVOR
BLOTTER M.D ,JAMES W. DOS 05/27/04
SS# 000-00-0000 MR# CV00038491

I agree to the following:

1. **CONSENT TO TREAT:** I consent to the treatment or admission of_____ at Cache Valley Speciality Hospital for services or supplies that have been or may be ordered by a licensed professional healthcare provider. I understand that treatment may include but is not limited to; radiological examinations, laboratory procedures, physical therapy, anesthesia, nursing care or medical and surgical treatment. I understand that all licensed professional healthcare providers that render service to the patient are responsible and liable for their own acts, orders and omissions. I acknowledge that the hospital has not made nor can it make a guarantee of the outcome of treatment.

2. **FINANCIAL AGREEMENT:** I agree to pay for all services and supplies rendered to the patient in accordance with the rates and financial policies in effect at the time of service. I authorize any overpayment made on this account to be transferred to any other account balance for which I am responsible. I agree to pay interest fees on any unpaid balance after 60 days of discharge or date of service at a rate not to exceed 18% apr. If this account is assigned to an attorney or a collection agency for collection then I agree to pay all collection agency fees, court costs, and attorney's fees.

3. **ASSIGNMENT OF INSURANCE BENEFITS:** I assign and authorize payment directly to Cache Valley Specialty Hospital of any healthcare benefits that the patient is entitled to receive. This assignment will not be withdrawn or voided at any time unless I pay the account in full. I understand that I am responsible for any and all charges not covered by my insurance policy(s). If the patient is entitled to Medicare or Medicaid benefits under Title XVIII of the Social Security Act, I request assignment of benefits directly to Cache Valley Speciality Hospital.

4. **ASSIGNMENT OF PHYSICIAN BENEFITS:** I am aware that physician services by Radiologist, Pathologist, Anesthesiologist, as well as medical, surgical and emergency care are not billed by the hospital but are billed separately. I understand that I am under the same obligation to those providers as stated in this agreement unless otherwise agreed to in writing with those providers. I authorize payment of any medical benefits for such claims to the appropriate provider.

5. **RELEASE OF MEDICAL INFORMATION:** I authorize the hospital or any professional healthcare provider who rendered services to the patient to release any medical or other information necessary to process claims.

6. **PERSONAL VALUABLES AND BELONGINGS:** I understand that the hospital maintains a safe for the protection of valuables. I agree that the hospital is not responsible for the loss or damage of any article or personal property unless they are deposited in the safe and a receipt issued.

7. **ADVANCE DIRECTIVE/LIVING WILL:** Federal Law requires that the hospital provide all adult patients with information about their right to make an Advanced Directive or Living Will. Please mark one of the following:
   - ☐ The patient has a Living Will or Durable Power of Attorney and requests that a copy be placed in their medical record. Copy available from:_____
   - ☐ The patient requests information in regards to their right to make advance healthcare directives.
   - ☑ The patient declines information in regards to their right to make advance healthcare directives.

   Action taken by admission clerk:_____

8. **RIGHT TO DONATE ORGANS:** The patient understands that they have a right to donate organs and they have discussed their decision with their family. Should circumstances arise please do the following:
   - ☐ Speak with the family regarding the matter.
   - ☑ The patient does NOT wish to donate. Please DO NOT Speak with the family in regards to the matter.

I understand and accept the terms of this agreement and certify that I am duly authorized by the patient or by law to execute the above agreement in their behalf.

Patient Heather Pett Date 5/26/04 Time 2:17

James E. Pett Father

Patient's Guardian or Representative Relationship Witness

EXHIBIT "B"

Charles A. Schultz (4760)
Attorney for James E. Pett
222 West 700 South
Brigham City, Utah 84302
Phone: 435.225.2636

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, LOGAN DEPARTMENT

SUPERIOR RECOVERY SERVICE, INC., Plaintiff, vs. JAMES E. PETT, Defendant.	*MEMORANDUM IN SUPPORT OF MOTION TO STRIKE THE AFFIDAVIT OF WENDY GITTINS* Case No. 060100241 DC Judge: Gordon J. Low

COMES NOW, James Pett and submits the following Memorandum in Support of this Motion to Strike the Affidavit of Wendy Gittins (hereinafter "Gittins").

STATEMENT OF FACTS

1. In paragraph 3, page 2. of her affidavit Gittins states: *"Based upon my personal*

knowledge, memory, and review of the Defendant's account in this matter, ***I have determined the following:***"

2. In paragraph 4, page 2, of her affidavit Gittins states: *"On or about May 27, 2004, Heather Pett, born September 16, 1999, the defendant's daughter, in Cache County, State of Utah obtained services and supplies from Interwest Anesthesia, and the principal charge was $572.00."*

3. In paragraph 5, page 2, of her affidavit Gittins states: *"The Defendant promised to pay for these services and supplies, signed a contract (the "Agreement").*

4. In paragraph 6, page 2, of her affidavit Gittins states: *"The Agreement provides that among other services that may be provided are anesthesia."*

5. In paragraph 7, page 2, of her affidavit Gittins states: *"The Agreement provides that Defendant, in addition to paying for the service and supplies, he is liable for interest at 18% per annum, court costs, the costs of collection, which includes a collection fee, and attorney's fees incurred in the collection process."*

6. In paragraph 8, page 2, of her affidavit Gittins states: *"The Agreement states under paragraph 2: FINANCIAL AGREEMENT: I agree to pay for all services and supplies rendered to the patient in accordance with the rates and financial policies in effect at the time of service."*

7. In paragraph 9, page 2, of her affidavit Gittins states: *"Paragraph 3 states: "I understand that I am responsible for any and all charges not covered by my insurance policy(s)."*

8. In paragraph 10, page 2, of her affidavit Gittins states: *"Per the terms of the Agreement,*

and in order to make sure that Interwest Anesthesia is made whole, a collection charge was added to the account in the amount of $317.57 prior to referral to Superior."

9. In paragraph 11, page 2, of her affidavit Gittins states: *"The Defendant breached the Agreement by not paying for the services and supplies."*

10. In paragraph 12, page 2, of her affidavit Gittins states: *"On or about July 12, 2004 the Defendant's insurance company, Altius, sent a payment, in the amount of $334.62, to Interwest Anesthesia."*

11. In paragraph 13, page 2, of her affidavit Gittins states: *"However, Altius retracted that payment on July 31, 2005, because on or about February 25, 2005, Altius paid the Defendant $514.80, to pay for the services and supplies provided by Interwest Anesthesia to the Defendant's daughter on or about May 27, 2004."*

12. In paragraph 14, page 2, of her affidavit Gittins states: *"We sent statements to the Defendant on a regular basis. On the account statement, when there is a finance charge, those dates that we sent statements. Finally, on September 2005, Interwest Anesthesia sent a pre-collection letter to the defendant, which included a copy of the account statement to day, requesting payment."*

ARGUMENT

BECAUSE GITTINS' AFFIDAVIT DOES NOT COMPLY WITH THE EXPRESS PROVISIONS OF RULE 56(e) URCP, IT MUST BE STRICKEN.

In pertinent part, Rule 56(e) URCP, (hereinafter "Rule 56"), provides as follows:

> *(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.* (Emphasis added).

Gittins' affidavit is not based on personal knowledge, as required by Rule 56. Therefore, it must be stricken.

In paragraph 3, page 2, of her affidavit Gittins states: *"Based upon my personal knowledge, memory, and review of the Defendant's account in this matter..."* Gittins' memory and review of the Defendant's account is not personal knowledge as mandated by Rule 56. Gittins' "*review of the Defendant's account in this matter*" does not qualify as personal knowledge. While Mr. Pett's account, so long as it contains only documents prepared and kept in the ordinary course of business may be admissible, does not mean that Mr. Pett's account is within Gittins' personal knowledge, and Gittins cannot base her affidavit on her personal interpretation of the alleged contents of Mr. Pett's account. Therefore, any portion of her affidavit that is based on her alleged *"review of the Defendant's account in this matter..."* is improper testimony in an affidavit and must be stricken.

Likewise, any of Gittins' statements in her Affidavit based on her alleged *"review of the Defendant's account in this matter..."* must be stricken because her affidavit does not contain *"Sworn or certified copies of all papers or parts thereof referred to in an affidavit."* as mandated by Rule 56. Therefore, any portion of her affidavit that is based on her alleged *"review of the Defendant's account in this matter..."* is improper testimony in an affidavit and must be stricken.

All of Gittins' affidavit after paragraph 3 must be stricken because all of those subsequent paragraphs are her personal conclusions, and affidavits must be based on personal knowledge of facts not conclusions. As previously set forth in this Memorandum, in paragraph 3, page 2, of her affidavit Gittins states: *"Based upon my personal knowledge, memory, and review of the Defendant's account in this matter,* ***I have determined the following:***"

Gittins is unequivocally stating that everything in her affidavit after paragraph 3 is something that she has personally determined, not that she knows, not even something that she believes she may remember, but something that she has determined. Rule 56 does not permit affidavits to be based on a person's opinion, conclusions or determinations. Because Gittins unequivocally states that everything in her affidavit after paragraph 3 is something that she has determined, paragraphs 5 through 14 of her affidavit must be stricken.

CONCLUSION

Because Gittins affidavit is not based on personal knowledge, as required by Rule 56, it must be stricken. Because paragraphs 4 through 14 or her affidavit are, by her own admission, her

personal determination, rather than statements of fact based on her personal knowledge, paragraphs 4 through 14 or her affidavit must be stricken as a matter of law. Therefore, the Court must grant Mr. Pett's Motion to Strike and strike paragraphs 4 through 14 or Gittins' affidavit.

Respectfully submitted this 30th day of August 2006.

Charles A. Schultz
Attorney for James E. Pett